TEMPORARY FILLING OF HOUSE OF REPRESENTATIVES VACANCIES DURING NATIONAL EMERGENCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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THURSDAY, FEBRUARY 28, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:12 p.m., in Room 2237, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Committee will come to order.

I am Steve Chabot, the Chairman of the Subcommittee on the Constitution of the Judiciary Committee.

The purpose of this legislative hearing is to address H.J. Res. 67, an amendment to the Constitution proposed by Mr. Baird, which would authorize governors to temporarily appoint representatives to take the place of those who have died or become incapacitated when 25 percent or more of all representatives are unable to perform their duties.

Mr. CHABOT. Ms. Lofgren has introduced a similar proposal, and I would ask that Mr. Baird, by unanimous consent, be permitted to join with us and make an opening statement if he would choose to do so and also question witnesses. Without objection, we will allow that to happen.

Our Constitution is the bedrock on which the oldest constitutional republic on the face of the earth rests. Over the course of well over two centuries only 27 amendments to our Constitution have ever been adopted, including the first 10 amendments, the Bill of Rights, and one amendment that repealed another amendment. The last amendment was adopted in 1992, a full 203 years after it was first proposed. We should, of course, tread most carefully and deliberately when considering altering our Constitution.

As the Congressional Research Service has pointed out, Representative Baird's proposal is not the first of its kind to have been introduced. From the 1940's through 1962, the issue of filling House vacancies in the event of a national emergency generated considerable interest among some Members of Congress during the Cold War with the former Soviet Union. More than 30 proposed constitutional amendments which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of representatives were introduced from the 79th through the 87th Congress. The House has never voted on any of those proposals.

Many of the current issues raised and policy arguments offered in support of or in opposition to the temporary appointment of representatives are the same as those that were made 50 years ago. For example, in 1954 Senator Knowland stated that such an amendment, quote, is a form of insurance which, of course, we hope will never have to be used, but in view of the fact that we are on notice that it would be conceivably possible to eliminate the House of Representatives by a single attack on the Nation's Capitol, I believe that we can no longer, as prudent citizens and as prudent Members of the House and Senate, ignore that possibility, unquote.

The Senate report accordingly—or excuse me—accompanying H.J. Res. 39 that same year warned that, quote, acts of violence may encompass attacks by atomic or hydrogen weapons, germ warfare or even wholesale assassination of Members of the House by less spectacular weapons, unquote.

The events of September 11th, 2001, have raised additional issues. Suicidal terrorists may act independently from sovereign nations and may not be deterred from using weapons of mass destruction because of the possible consequences for their own citizens.

On the other hand, the situation in the 1950's may have been much more dire than it is today, because a nuclear attack was expected to occur, if at all, with overwhelming force, destroying much, if not most, of the American landmass.

Opponents of an amendment argue that allowing governors to appoint representatives temporarily would depart from a foundational principle under which the House has kept close to the people and each Member has taken a seat only as a result of direct election by the voters in the Member's district. Such appointments might also contribute to unrest or fear among the Nation's citizens by casting doubt upon the government's ability to respond to crises.

Also, as Representative Snyder has written, the States, rather than Congress, may be in the best position to provide for expedited election procedures in emergencies. Further, procedural concerns about constituting a quorum in order to conduct legislative business when certain Members may be incapacitated could be resolved by modifying House rules, rather than by amending the Constitution.

In addition, the appointments also could result in a change in party control of Congress if governors' appointees were of a party different from that of their predecessors. This shift could result in a change in the legislative agenda, and the actions of the short-term appointees could have long-term effects.

In addition to discussing the proposed text of a constitutional amendment today, we should look to and learn from our strong and resilient Nation's history of responding to national emergencies. We should also consider whether there are more or equally pressing problems with current provisions providing for continuity in government.

With those considerations in mind, I look forward to hearing from our witnesses today.

I will now yield to the gentleman from Virginia, Mr. Scott, if he would like to make an opening statement.

Mr. SCOTT. Mr. Chairman, I would like to yield to the gentleman from Washington for a statement.

Mr. CHABOT. Okay. Mr. Baird is recognized for 5 minutes.

Mr. BAIRD. I thank the Chair, and I thank my colleague from Virginia.

I, on the evening of September 11th, asked myself a question which, when I phrased it to myself, still sends chills up my spine, and it was this: What would happen in our country if people were watching the television or listening to the radio and the following occurred: An interrupted news bulletin that says, we interrupt this broadcast to inform you that a nuclear weapon has been detonated in our Nation's Capitol. Members of the House and Senate are believed to have been killed, the President is believed to have been killed, the Supreme Court is believed to have been killed, and it is unclear the whereabouts of other Members of the Cabinet at this moment.

If that were to happen, I could not imagine a more terrifying message to our citizens, and currently we do not have a good answer to the fundamental question. Now what? The fact is that we now live in a time where people around the world and within our own borders despise our government and despise everything our Nation stands for and would dearly love and would work very diligently to get their hands on weapons that could achieve precisely the sort of strike that I just described. To believe otherwise I think is to fail to appreciate the current situation in the world.

The challenge then is, what do we do to prepare for that?

First of all, we must do everything we can to prevent its occurrence. But if it were to happen, the only way in which the House of Representatives can be replaced is through special election, as the Chairman noted. The challenge there is that special elections under current procedures take weeks, months, possibly longer.

I polled a number of auditors in my region, including the president of the National Auditors Association, and asked, what is the fastest you could put together a special election? The average answer was 7 to 8 weeks for a primary, a little quicker for a general. But the general sense was, if we could put together special elections in 90 days we would be doing a pretty good job.

The challenge there is, as each State has different procedures under current laws, you would have currently sort of a tricklingin effect, where some States elected their representatives who came in, thereby possibly changing the balance of control in the House. Others, then, later on. I don't think that is the situation we want.

The other possible scenarios is that a few survivors declare themselves under the rules a quorum and then proceed to appoint the Speaker of the House who then potentially could even move to the presidency and could declare war. I don't think the framers wanted the House of Representatives acting with just a few people. People have raised concerns about the political makeup of the House. I can't imagine a more frightening scenario than just a few Members.

If you think that gubernatorial appointment could change the political makeup of the House, imagine if the House is functioning with just a few random survivors; and we really seriously have to consider the possibility there might be no survivors whatsoever.

So what we have put forward is fairly simple, as I think the constitutional amendments should be. It says, in essence, that if a quarter or more of the House Members are killed or disabled, then governors can appoint replacements within a 7-day period, following which we would have special elections during a 90-day period.

Ideally, I believe we would enact—statutory language calls for primaries on a consistent day, general elections on the same day, so that the new body could move in quickly. My premise is that I think we need to tell the American people and our potential adversaries that you could destroy our current members of this government but you cannot destroy our government or our constitutional mechanism of functioning.

One of my other fears is if we do have an amendment of this sort, it is a grave temptation for someone in the executive branch to declare extra constitutional powers. We need to understand, I think, that that individual might well be a lower Cabinet official who most Americans have never heard of; and they would suddenly appear and say, I am now the President of the United States, and since there is no Congress, I am taking extra constitutional powers. That is not the scenario we need in a time of crisis.

Personally, I think there is merit to discussing possible alternatives. Maybe the threshold should be half instead of a quarter. There are legitimate concerns about whether partisan—or party appointments should be required, and my understanding is Senator Specter on the Senate side may be introducing legislation to that effect. I am willing to work we either of those.

The one fundamental message for me is this: The current status quo leaves our Nation vulnerable, it leaves our Constitution vulnerable, and we have an obligation to correct that.

I thank the Ranking Member and the Chair for their diligence and leadership on this, and I thank our witnesses. Your testimony, written testimony has been outstanding. I enjoyed reading it. I particularly thank Mr. Ornstein, who has been a leader on this issue from virtually the day after September 11th. I look forward to your testimony, and, again, I thank the Chairman and the Ranking Member.

Mr. CHABOT. I thank the gentleman, and I thank him for the time that he has invested in this very important issue. However we ultimately—however this turns out, he is to be commended for the hard work and effort that he put into this.

Does the gentleman from Virginia have——

Mr. SCOTT. No, thank you, Mr. Chairman. I would like to hear from the witnesses.

Mr. CHABOT. Okay. Thank you very much.

We have a particularly impressive panel here this afternoon, and we do appreciate y'all being here.

We will first hear from Harold Relyea, a specialist in American national government at the Congressional Research Service. Among the many reports Mr. Relyea has written for CRS are those regarding current Federal arrangements for continuity of government, terrorist attacks and national emergency declarations, martial law and national emergency powers in executive orders.

Our next witness is Norman J. Ornstein. Mr. Ornstein is a resident scholar at the American Enterprise Institute for Public Policy Research. Mr. Ornstein has written extensively on issues related to continuity in government, and I personally have read a number of, over the past few months, extensive writings. And we appreciate your attention to this important issue as well.

Our next witness is M. Miller Baker, a partner at the law firm of McDermott, Will & Emery, where he practices constitutional law. Previously, Mr. Baker served as counsel to Senator Orrin G. Hatch on the U.S. Senate Judiciary Committee and as an attorney adviser in the Office of Legal Policy and later as Special Assistant to the Assistant Attorney General for Civil Rights at the Justice Department.

Finally, we will hear today from Charles Tiefer, Professor of Law at the University of Baltimore School of Law. Previously, Professor Tiefer served for 11 years as Solicitor and Deputy General Counsel of the U.S. House of Representatives. He has taught at Yale Law School and at the Georgetown University Law Center. He is also the author of Congressional Practice and Procedure, the only treatise on congressional procedure.

I have noted the Ranking Member, Mr. Nadler, has entered the room. Mr. Nadler, if you wanted to make an opening statement, we will be happy to hear that at this time.

Mr. NADLER. Thank you, Mr. Chairman. I will be very brief. I want to commend you for holding these hearings today.

No one likes to think the unthinkable, especially when the unthinkable may concern their own mortality, but our colleague, Mr. Baird, has raised a very important question, and however we decide to answer, we cannot ignore it.

I know a little something about the unthinkable. On September 11th, as I was preparing to leave for my office in the Rayburn building, I saw on television the two jumbo jets crash into the—I saw the second jumbo jet crash into the twin towers, which were located in my district.

At the same time, the Pentagon was also attacked; and were it not for the courage and self-sacrifice of a few citizens on a fourth flight, we might not be discussing this issue as a hypothetical matter today.

This was a dastardly and cowardly attack on all Americans. The people of my district continue to struggle in the aftermath of this terrible act of international terrorism. So I want to commend our colleague, Mr. Baird, for energetically pressing his concerns about what many of us, I am sure, would not like to think about.

I look forward to the testimony of our distinguished panel. I thank you.

Mr. CHABOT. Thank you, Mr. Nadler.

We will begin with Mr. Relyea.

I might note that we would ask that the witnesses confine their testimony to 5 minutes. As you know, we have got a lighting system with a green light on. You have got 4 minutes on there. Then the yellow light will come on. Please wrap it up in that time. Then the red light will come on. We would hope you would conclude at that time or as close to that time as possible.

Mr. CHABOT. Mr. Relyea.

STATEMENT OF HAROLD RELYEA, EXPERT AND SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, GOVERNMENT AND FINANCE DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. RELYEA. Thank you, Mr. Chairman, Members of the Subcommittee. I thank you for the opportunity to testify on the Federal experience with responding to national emergencies and maintaining the continuity of government.

The occurrence of a national emergency often requires the exercise of emergency powers. My statement attempts to explain the origin and character of emergency powers. It also briefly reviews five historical periods rich in the experience of the exercise of emergency powers, including our own contemporary response to terrorist attacks. In this review, I have sought to emphasize the relationships of our three constitutional branches during such times of crisis.

In addition, having been apprised of the Subcommittee's interest in continuity of government and the exercise of martial law, I have supplemented my statement with two brief CRS reports on these matters.

As the historical record recounted in my statement suggests, Congress and the Federal courts have not been very effective counterweights to the exercise of emergency power by the President. Judges, as was acknowledged by the Supreme Court in the Milligan case in 1866, may defer, delay, or rule narrowly on presidential emergency actions until the period of crisis has passed.

Congress may also choose this course as well, as it did when it effectively terminated unnecessary war statutes and agencies in 1921, well after the end of the fighting in Europe. However, when enacting legislation vesting emergency authority in the executive, Congress may include a sunset provision, automatically terminating the statute on the occasion of a particular event or a condition marking the end of the emergency, such as the establishment of an armistice or the ratification of a peace treaty.

For many years Congress has legislated standby delegations of emergency authority which could be activated with a formal national emergency declaration. In 1976, with the National Emergencies Act, Congress created procedural arrangements for such declarations, limited their effects to selective activation of standby authorities, and provided itself with the means to cancel unwarranted national emergency declarations or inappropriate activations of standby authorities.

Finally, through the power of the purse, Congress may restrain or scale down executive actions responding to a national emergency, and this was done abruptly and drastically after the November 1918 armistice in Europe with unfortunate consequences for American national defense programs. A better model may be found in congressional support of demobilization and reconversion of the economy to peacetime conditions in 1944, 1945 and the immediate years after the end of World War II.

Ultimately, the Constitution and the form of government it guarantees have survived many national emergencies in the life of the Nation, the three branches not always being in equal check and balance with each other during these periods of crisis, just as they may not be in less perilous times.

Thank you again for the opportunity to be here today.
Mr. CHABOT. Thank you very much.
[The prepared statement of Mr. Relyea follows:]

PREPARED STATEMENT OF HAROLD C. RELYEA

Mr. Chairman, thank you for this opportunity to testify on the federal experience with responding to national emergencies and maintenance of the continuity of government. The occurrence of a national emergency often requires the exercise of emergency powers. My statement attempts to explain the origin and character of emergency powers. It also briefly reviews five historical periods rich in the experience of the exercise of emergency powers, including our own contemporary response to terrorist attacks. In this review, I have sought to emphasize the relationships of our three constitutional branches during such times of crisis. In addition, having been apprized of the Subcommittee's interest in continuity of government and the exercise of martial law, I am supplementing my statement with two brief CRS reports on these matters.

INTRODUCTION

At various times in American history, emergencies have arisen—posing, in varying degrees of severity, the loss of life, property, or public order—and threatened the well-being of the nation. In response, Presidents have exercised such powers as were available by explicit grant or interpretive implication, or otherwise acted of necessity, trusting to a subsequent acceptance of their actions by Congress, the courts, and the citizenry. Moreover, as the historical record reflects, the response to such emergencies, whether by the executive, legislature, judiciary, or some combination thereof, may bear concomitant dangers for citizens' rights and liberties.

Unlike many other democracies or near democracies, the United States does not suspend its Constitution during times of emergency, whether the condition be war, natural disaster, or economic crisis. Except for the privilege of habeas corpus, the Constitution prescribes no arrangement whereby the rights, governmental structure, or procedures specified in its provisions can be temporarily discontinued, in whole or in part, in order to respond to an exigency. As a nation, our endurance surely owes much to leaders throughout the federal establishment who relied upon "stretch points" of the Constitution in responding to an emergency.

A national emergency may be said to be gravely threatening to the country, and recognizable in its most extreme form as auguring the demise of the nation. The more extreme the threat, likely more widespread will be the consensus that a national emergency exists. However, in political rhetoric, the term, at times, has been artfully used to rally public support, or employed nebulously. According to a dictionary definition, an emergency is "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[1] In the midst of the crisis of the Great Depression, a 1934 majority opinion of the Supreme Court characterized an emergency in terms of urgency and relative infrequency of occurrence, as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.[2] Constitutional scholar Edward S. Corwin once explained emergency conditions as being those "which have not attained enough of stability or recurrency to admit of their being dealt with according to rule."[3] During Senate committee hearings on national emergency powers in 1973, political scientist Cornelius P. Cotter described an emergency, saying: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits."[4] The term, he explained, "connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal."[5]

While other understandings of an emergency could be offered, these are sufficient to provide a sense of the concept. An emergency condition appears to have at least four aspects. First is its temporal character: an emergency is sudden, unforeseen, and of unknown duration. Second is its potential gravity: an emergency is dan-

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[1] Henry Bosley Woolf, ed., *Webster's New Collegiate Dictionary* (Springfield, MA: G & C Merriam, 1974), p. 372.

[2] *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 440 (1934).

[3] Edward S. Corwin, *The President: Office and Powers, 1787–1957*, 4th revised edition (New York: New York University Press, 1957), p. 3.

[4] U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, 93rd Cong., 1st sess., hearings, Apr. 11, 1973 (Washington: GPO, 1973), p. 277.

[5] *Ibid.*, p. 279.

gerous and threatening to life, property, and well-being. Third, in terms of governmental role and authority, is the matter of perception: who discerns this phenomenon? The Constitution may be guiding on this question, but not always conclusive. Fourth, is the matter of response: an emergency requires immediate action, but is, as well, unanticipated and, therefore, as Corwin noted, cannot always be "dealt with according to rule." A national emergency is threatening to the nation or some significant portion of its geography, interests, or security.

It should be quickly added that, while some kinds of emergencies may have been unforeseen the first time that they occurred, the federal government, over time, as the historical record bears witness, began taking steps to detect and address subsequent recurrences. The evolution of both civilian and military intelligence capabilities reflects this precautionary development, as do contingency preparations—military and other response plans, as well as standby legal authorities—to facilitate quick and effective counteraction to some kinds of emergency.

FINDING THE LIMITS

The exercise of emergency powers had long been a concern of the classical political theorists, including the 17th century English philosopher John Locke, who had a strong influence upon the Founding Fathers in the United States. A preeminent exponent of a government of laws and not of men, Locke argued that occasions may arise when the executive must exert broad discretion in meeting special exigencies or "emergencies" for which the legislative power provided no relief or existing law granted no necessary remedy. He did not regard this prerogative as limited to wartime, or even to situations of great urgency. It was sufficient if the "public good" might be advanced by its exercise.[6]

The Constitution created a government of limited powers, and emergency powers, as such, failed to attract much attention during the Philadelphia convention of 1787 which created the charter for the new government. It may be argued, however, that the granting of emergency powers to Congress is implicit in its Article I, section 8 authority to "provide for the common Defense and general Welfare"; the commerce clause; its war, armed forces, and militia powers; and the "necessary and proper" clause empowering it to make such laws as are required to fulfill the executions of "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The President was authorized to call special sessions of Congress, perhaps doing so in order that arrangements for responding to an emergency might be legislated for executive implementation.

There is a tradition of constitutional interpretation that has resulted in so-called implied powers, which may be invoked in order to respond to an emergency situation. Locke seems to have anticipated this practice. Furthermore, Presidents have occasionally taken an emergency action which they assumed to be constitutionally permissible. Thus, in the American governmental experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive's view of the office.

A President adopting Theodore Roosevelt's "stewardship" theory of office would seemingly have little reservation about exercising implied executive powers. Explaining this view in his autobiography, Roosevelt wrote that he "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it." On the contrary, it was his belief "that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[7]

Opposed to this view of the presidency was Roosevelt's former Secretary of War and personal choice for, and actual successor as, Chief Executive, William Howard Taft. The "true view of the Executive functions," in his opinion, was "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." Either the Constitution or "an act of Congress passed in pursuance thereof" must convey this specific grant of power. "There is no undefined residuum of power," he concluded, that the President "can exercise because it seems to him to be in the public interest . . ."[8]

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[6] Thomas I. Cook, ed., *Two Treatises of Government*, by John Locke (New York: Hafner, 1947), pp. 203–207; Edward S. Corwin, *The President: Office and Powers, 1787–1957*, pp. 147–148.

[7] Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (New York: Macmillan, 1913), pp. 388–389.

[8] William Howard Taft, *Our Chief Magistrate and His Powers*(New York: Columbia University Press, 1916), pp. 139–140.

Between these two views of the presidency lie various gradations of opinion, perhaps as many conceptions of the office as there have been holders. Generally, however, those holding Roosevelt's "stewardship" view have been more comfortable with a broad exercise of prerogative powers in times of emergency. However, if the authority of a President is largely determined by the incumbent himself, do the constitutional checks of the other two branches have no significance in this regard? To answer this question, the powerful effect of public opinion in times of emergency must be appreciated. If, for example, the nation has been attacked, or a considerable number of Americans have been killed or injured in an overseas assault, such as the sinking of an unarmed ship, public opinion likely will quickly support reprisals ordered by the President as an emergency response. Members of Congress who question the President's authority to take such actions may incur the enmity of the populace. Later, with the passage of time, as military reversals and stalemate occur, casualties increase, diplomatic resolutions fail, and the domestic economy weakens, support for the President's emergency actions may diminish within both the nation and Congress, and constitutional checks may be more freely exercised; tolerance for dissent as an exercise of First Amendment right may increase; and courts may become more accepting of cases questioning and seeking to restrain presidential emergency action.

What are the legitimate powers of the legislative, executive, and judicial branches in times of emergency? One answer to this question is that the legitimate powers of the three branches are those supported by the Constitution—i.e., those explicitly specified, reasonably inferred, or otherwise not prohibited by the fundamental charter. Moreover, there is a political dimension to be taken into consideration as well. There may be exercises of power by the three branches in times of emergency that are constitutionally suspect: they are neither explicitly specified or otherwise prohibited, but opinion is divided as to whether or not they may be reasonably inferred. Nonetheless, they are exercised in the absence of effective opposition by the other branches and with the acceptance, if not the support, of a majority of the public. Such exercises of power are often justified as being "of necessity," and usually are of brief duration. In a few instances, such as President Abraham Lincoln's emergency actions in response to insurrection in the southern states prior to the July 1861 convening of Congress and President Franklin D. Roosevelt's declaration of a "bank holiday" closing the nation's banking institutions in March 1933, the legislature provided post factum statutory legitimizations of the Chief Executive's exercise of emergency power.

THE HISTORICAL RECORD

Since the inauguration of government under the Constitution in the spring of 1789, many instances of the exercise of emergency power have occurred. Among the initial efforts of Congress to legislate emergency authority were acts of September 29, 1789, and May 8, 1792, authorizing the President to call forth the militia of the states, initially, to protect the inhabitants of the frontiers, and, subsequently, to execute federal laws, suppress insurrections, and repel invasions.[9] The first presidential response to an emergency saw George Washington utilizing the latter statute to mobilize the militia to suppress an insurrection in August 1794. Known as the "Whiskey Rebellion," it was provoked by a federal excise tax on whiskey, which residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing. Washington personally took command of the forces organized to put down the rebellion. In the case of the third branch, a critical judicial ruling, not dealing with, but having significant importance regarding, emergency powers, occurred in 1803 when the Supreme Court, in *Marbury* v. *Madison*, held an act of Congress unconstitutional for the first time, and established its authority for determining ultimately what is law under the Constitution.[10]

Because a systematic review of the exercise of emergency powers during the entire history of the federal government is not possible here, attention is concentrated on five eras rich in such experience—the Civil War, World War I, the Great Depression, World War II, and the current homeland security period.

Civil War

For several decades, controversy and conflict over slavery had steadily grown in the nation until it erupted in regional rebellion and insurrection in late 1860. News of the election of a President known to be hostile to slavery—Abraham Lincoln—prompted a public convention in South Carolina, which met a few days before

[9] 1 Stat. 95, 264.
[10] 5 U.S. 137 (1803).

Christmas and voted unanimously to dissolve the union between that state and the other states. During the next two months, seven states of the Lower South followed South Carolina in secession. Simultaneously, state troops began seizing federal arsenals and forts located within the secessionist territory. In his fourth and final annual message to Congress on December 3, 1860, President James Buchanan conceded that, due to the resignation of federal judicial officials throughout South Carolina, "the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished." He contended, however, that "the Executive has no authority to decide what shall be the relations between the Federal Government and South Carolina." Any attempt in this regard, he felt, would "be a naked act of usurpation." Consequently, Buchanan indicated that it was his "duty to submit to Congress the whole question in all its bearings," observing that "the emergency may soon arise when you may be called upon to decide the momentous question whether you possess the power by force of arms to compel a State to remain in the Union." Having "arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government," he proposed that Congress should call a constitutional convention, or ask the states to call one, for purposes of adopting a constitutional amendment recognizing the right of property in slaves in the states where slavery existed or might thereafter occur.[11]

By the time of President-elect Lincoln's inauguration (March 4, 1861), the Confederate provisional government had been established (February 4); Jefferson Davis had been elected (February 9) and installed as the President of the Confederacy (February 18); an army had been assembled by the secessionist states; federal troops, who had been withdrawn to Fort Sumter in Charleston harbor, were becoming desperate for relief and resupply; and the 36th Congress had adjourned (March 3). A dividing nation was poised to witness, as Wilfred Binkley wrote, "the high-water mark of the exercise of executive power in the United States." Indeed, he continued, "No one can ever know just what Lincoln conceived to be limits of his powers."[12]

A month after his inauguration, the new President notified South Carolina authorities that an expedition was en route solely to provision the Fort Sumter troops, which prompted those state officials to demand that the garrison's commander immediately surrender. He demurred, and, on April 12, the fort and its inhabitants were subjected to continuous, intense fire from shore batteries until they finally surrendered. The attack galvanized the North for a defense of the Union. Lincoln, however, did not straightaway call Congress into special session. Instead, for reasons not altogether clear, he not only delayed convening Congress, but also, with broad support in the North, engaged in a series of actions which intruded upon the constitutional authority of the legislature. Lincoln's rationale for his conduct may be revealed in a comment he reportedly made in 1864: "I conceive I may in an emergency do things on military grounds which cannot constitutionally be done by the Congress."[13]

In a proclamation of April 15, 1861, Lincoln, recognizing "combinations too powerful to be suppressed by the ordinary course of judicial proceedings" or the United States marshals in the seven southernmost states, called 75,000 of "the militia of the several States of the Union" into federal service "to cause the laws to be duly executed." He also called Congress to convene in special session on July 4 "to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand."[14]

Then, in a proclamation of April 19, Lincoln established a blockade of the ports of the secessionist states,[15] "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war," notes Rossiter.[16] Congress, of course, had not been given an opportunity to consider a declaration of war.

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[11] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. 7 (New York: Bureau of National Literature, 1897), pp. 3165–3167.

[12] Wilfred E. Binkley, *President and Congress*(New York: Alfred A. Knopf, 1947), p. 126.

[13] George Fort Milton, *The Use of Presidential Power, 1789–1943*(Boston, MA: Little, Brown, 1944), p. 111; contemporary legal support for this point of view may be found in a treatise by the solicitor of the Department of War, William Whiting, *War Powers Under the Constitution of the United States* (Boston, MA: Little, Brown, initially published 1862).

[14] Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. 7, pp. 3214–3215.

[15] *Ibid.*, pp. 3215–3216.

[16] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*(Princeton, NJ: Princeton University Press, 1948), p. 225.

The next day, the President ordered that 19 vessels be added to the navy "for purposes of public defense."[17] Shortly thereafter, the blockade was extended to the ports of Virginia and North Carolina.[18]

In a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three-year terms of service.[19] The Constitution, however, specifically empowers only Congress "to raise and support armies."

In his July 4 special session message to Congress, Lincoln indicated that his actions expanding the armed forces, "whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he continued, "that nothing has been done beyond the constitutional competency of Congress."[20] Indeed, in an act of August 6, 1861, Lincoln's "acts, proclamations, and orders" concerning the army, navy, militia, and volunteers from the states were "approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress."[21]

The 37th Congress, which Lincoln convened in July, initially met for about a month "to consider only the measures necessary to sustain the war effort." Members returned in December for a second session, which consumed about 200 days of the next year, and a third session, beginning in December 1862, which ended in early March 1863. The President had party majorities in both chambers: about two-thirds of the Senate was Republican and the House counted 106 Republicans, 42 Democrats, and 28 Unionists. The 1862 elections shifted the House balance to 102 Republicans and 75 Democrats. Despite the numerical dominance of the Republicans, presidential leadership was needed for legislative accomplishments because, by one assessment, within the House and the Senate, "no one individual or faction was able to establish firm control of the congressional agendas during the Civil War." A crucial factor in Lincoln's dealings with legislators was his role as "chief patronage dispenser in the American political system" and his serving, as well, as "a kind of court of last resort to whom congressmen could appeal lower-level decisions or whom they might use to manipulate the federal system to their particular advantage."[22]

Investigation and oversight activities by congressional committees increased during the Civil War, "when 15 of 35 select committees were primarily concerned with wrongdoing or improper performance of duties," and similar probes were being conducted by at least six standing committees. The war affected these inquiries because it added urgency to proper administrative performance and prompted enlarged federal expenditures. There were, as well, committee examinations of matters more closely connected with the war. The House Committee on the Judiciary, for example, investigated loyalty problems, including the conduct of some Members of the House, and telegraphic censorship of the press. The House Select Committee on the Loyalty of Clerks and Other Persons Employed by Government left many distressed when it solicited the views of faithful, longtime department employees regarding their colleagues and sought the dismissal of federal workers without allowing an opportunity for confronting accusers or rebutting allegations of disloyalty. The House Special Committee on Government Contracts also proved to be controversial due to members' energetic righteousness concerning contracting practices.[23] Perhaps the best known of the wartime overseer panels was the Joint Committee on the Conduct of the War, which has undergone some reevaluation by historians in recent years. While some of its tactics—secret testimony, leaks to the press, disallowance of an opportunity to confront or cross-examine accusers—and its bias against West Point officers remain unacceptable, its probes of the Fort Pillow massacre, in which Union black troops were murdered and not allowed to surrender, and the poor condition of Union soldiers returned from Confederate prisons "were among its more positive achievements." One historian concluded that "a number of its investigations exposed corruption, financial mismanagement, and crimes against humanity," with the result, he affirms, that the panel "deserves praise not only for exposing these abuses but also for using such disclosures to invigorate northern public opinion and bolster the resolve to continue the war. Had the committee's work always been modeled on

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[17] *Ibid.*
[18] Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. 7, p. 3216.
[19] *Ibid.*, pp. 3216–3217.
[20] *Ibid.*, p. 3325.
[21] 12 Stat. 326.
[22] Allan G. Bogue, *The Congressman's Civil War*(Cambridge, UK: Cambridge University Press, 1989), pp. xiv-xv, xviii, 57.
[23] *Ibid.*, pp. 60–88.

these investigations," he offered, "there would be little debate about its positive, albeit minor, contribution to the Union war effort."[24] Overall, however, congressional overseers appear to have had little restraining effect on the presidential exercise of emergency powers.

In his efforts at suppressing the rebellion of the southern states, Lincoln regarded his war power as including "the right to suspend the habeas corpus privilege; the right to proclaim martial law; the right to place persons under arrest without warrant and without judicially showing the cause of detention; the right to seize citizens' property if such seizure should become indispensable to the successful prosecution of the war; the right to spend money from the treasury of the United States without congressional appropriation; the right to suppress newspapers; and the right to do unusual things by proclamation, especially to proclaim freedom to the slaves of those in arms against the Government." In these actions, observed historian James G. Randall, Lincoln "was as a rule, though not without exception, sustained by the courts."[25]

At the time of Lincoln's assumption of the presidency, the federal courts had collapsed in the states in rebellion, and those finding themselves in war zones either temporarily suspended operations or succumbed to declarations of martial law and trials by military tribunals. Many of the federal judges serving in the North, Northwest, and West probably were sympathetic to the new President's antislavery position, but that did not mean that they would necessarily support his exercise of war powers to take extraordinary actions. Similarly, there was uncertainty about how the Supreme Court would evaluate Lincoln's actions to quell the rebellion. The Court, and particularly Chief Justice Roger B. Taney, had disgraced itself, in the view of many Americans, and engendered the enmity of the Republican party with its Dred Scott decision in 1857.[26] When Lincoln was inaugurated, there was one vacancy on the Court due to a death; a month later, death claimed another justice; soon thereafter, a third vacancy occurred when a justice resigned to join the Confederate cause. Later, in 1862, Congress created a tenth seat on the Court.[27] Thus, Lincoln had four opportunities to fashion a Supreme Court likely to be supportive of his presidency.[28]

Although Chief Justice Taney declared in May 1861 that the President had improperly suspended the habeas corpus privilege, his ruling was rendered on circuit when military authorities refused to honor his writ for John Merryman.[29] Nonetheless, his opinion provided a warning, one clearly understood by the Attorney General, who warned the Secretary of War in January 1863 against seeking Supreme Court review of a Wisconsin case involving the President's suspension power.[30] About a month later, Congress gave final approval to a statute authorizing the President, "during the present rebellion," to suspend habeas corpus.[31] Under the provisions of the act, officers in charge of prisons were required to obey a judge's order for release, and those against whom no violation of federal law was charged

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[24] Bruce Tap, *Over Lincoln's Shoulder: The Committee on the Conduct of the War*(Lawrence, KS: University Press of Kansas, 1998), pp. 253, 255; also see Elisabeth Joan Doyle, "The Conduct of the War, 1861," in Arthur M. Schlesinger, Jr., and Roger Bruns, eds., *Congress Investigates: A Documented History, 1792–1974*, Vol. 2 (New York: Chelsea House/R. R. Bowker, 1975), pp. 1197–1232; E. B. Long, "The True Believers: The Committee on the Conduct of the War," *Civil War Times Illustrated*, 20 (August 1981): 20–27; William Whatley Pierson, Jr., "The Committee on the Conduct of the Civil War," *American Historical Review*, 23 (April 1918): 550–576; Hans L. Trefousse, "The Joint Committee on the Conduct of the War: A Reassessment," *Civil War History*, 10 (March 1964): 5–19; Howard C. Westwood, "The Joint Committee on the Conduct of the War—A Look at the Record," *Lincoln Herald*, 80 (Spring 1978): 3–15; T. Harry Williams, "The Committee on the Conduct of the War: An Experiment in Civilian Control," *Journal of the American Military Institute*, 3 (Fall 1939): 139–156.

[25] James G. Randall, *Constitutional Problems Under Lincoln*, revised edition (Urbana, IL: University of Illinois Press, 1951), pp. 36–37.

[26] *Scott*v. *Sandford*, 60 U.S. 393 (1857); one of the most important cases in American constitutional history, the 7–2 decision, which played a major role in precipitating the Civil War, was rendered for the majority by Chief Justice Taney, who ruled that Scott remained a slave, that Congress exceeded its authority when it forbade or abolished slavery in the territories because no such power could be inferred from the Constitution, and that slaves were property protected by the Constitution; see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

[27] 12 Stat. 794.

[28] See David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: University of Illinois Press, 1956), pp. 1–13, 84–85.

[29] *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861); see Silver, *Lincoln's Supreme Court*, pp. 28–36.

[30] See Randall, *Constitutional Problems Under Lincoln*, p. 132; Silver, *Lincoln's Supreme Court*, pp. 123–125.

[31] 12 Stat. 755–756.

could not be held. Also, lists of those political prisoners arrested in the past, as well as those incarcerated in the future, were required to be kept and furnished to the courts. However, Randall concluded "that the act was not carried out in sufficient degree to make any noticeable difference in the matter of the arrest, confinement, and release of political prisoners."[32]

Arbitrary arrests and the use of the military as both policemen and courts continued in certain areas throughout the war. Because of the controversy they engendered, the administration took pains to explain and justify their utilization, and, beginning in February 1862, to temper criticism with grants of amnesty.[33] Court tests of the President's authority in these matters were avoided; Congress reacted by creating the office of Judge Advocate General in July 1862 to supervise all courts martial and military commission proceedings.[34] In the *Vallandigham* decision of 1864, the Supreme Court avoided constitutional issues posed by the exiled treasonist, who had been convicted by a military commission, and ruled narrowly that it lacked jurisdiction for an appeal from a military tribunal.[35] Finally, one year after the end of the Civil War in April 1865, the Supreme Court, noting that "the late wicked Rebellion" had not allowed "that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question," unanimously declared that military commissions, in an uninvaded and nonrebellious state, in which the federal courts are open and functioning, "had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service."[36]

In contrast to these developments was the Supreme Court's ruling in the *Prize Cases* almost two years after the beginning of the war, "deemed the most significant decision the Court handed down during the conflict."[37] Technicalities aside, the case posed the key question of the President having authority to impose a blockade of southern ports without congressional authorization. If the President's action was determined to be illegal, a vast amount of restitution might have to be paid. In addition, Lincoln wanted the blockade to be sustained as a response to a rebellion rather than a war, the latter condition constituting something of an invitation to foreign powers to recognize and assist the Confederacy. Ultimately, a 5–4 majority, which included three Lincoln appointees, supported the President's action and his rebellion theory.[38]

Reviewing the emergency period of the Civil War, scholars generally have concluded "that neither Congress nor the Supreme Court exercised any very effective restraint upon the President."[39] The actions of the Chief Executive were either unchallenged or sanctioned by Congress, and were either justified, or, because of no opportunity to render judgment, went without evaluation by the Supreme Court. Regarding the other two branches, Lincoln sought support for, or approval of, his actions when he thought he could obtain it, and avoided situations where disapproval might result. In pursuing this strategy, he was always keenly aware of popular approval of his presidency. For the remainder of the century and throughout the next, no President would exercise emergency powers in quite the same way or under quite the same crisis conditions as did Lincoln.

World War I

When war swept over Europe during the latter months of 1914, the United States, in terms of emergency conditions confronting the nation as a whole, was unaffected by the conflict. The presidential contest of 1912 had resulted in the election of Woodrow Wilson, the first Democrat to occupy the White House since 1897. His party held a substantial margin of seats (291–127) in the House at the start of his administration, which quickly dwindled during the next two Congresses and disappeared in 1918; an initial seven-seat margin in the Senate grew slightly during the next two Congresses before the opposition gained a two-seat majority in 1918. The Supreme Court greeting Wilson was largely conservative and, although it had

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[32] Randall, *Constitutional Problems Under Lincoln*, p. 166.

[33] See Silver, *Lincoln's Supreme Court*, pp. 119–129, 131–137, 147–155, 227–236; Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991).

[34] 12 Stat. 598.

[35] *Ex parte Vallandigham*, 68 U.S. 243 (1864).

[36] *Ex parte Milligan*, 71 U.S. 2 (1866).

[37] Silver, *Lincoln's Supreme Court*, p. 104.

[38] 67 U.S. 635 (1863); see Silver, *Lincoln's Supreme Court*, pp. 104–118.

[39] Randall, *Constitutional Problems Under Lincoln*, p. 517; for concurrences with this view, see Binkley, *President and Congress*, pp. 124–127; Rossiter, *Constitutional Dictatorship*, pp. 233–234; and Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1907), p. 58.

given the commerce clause a little broader reading in the early years of the century, it continued to hold a narrow view of the Constitution's protection of individual rights. Associate Justice Edward D. White was elevated to the position of Chief Justice in 1910; President Wilson would appoint three members of the High Court during his two terms. In March 1913, Wilson embarked on regularly-scheduled conferences with the Washington press corps, an innovation reflective of his intention to gauge, mold, and lead public opinion.

During the initial months of the war in Europe, the United States adopted a policy of neutrality, but a little later, in September 1915, Wilson reluctantly agreed to allowing American bankers to make general loans to the belligerent nations. These loans, foreign bond purchases, and foreign trade tended to favor Great Britain and France. Earlier, in February 1915, Germany proclaimed the waters around the British Isles a war zone which neutral ships might enter at their own risk. In May, the transatlantic steamer Lusitania, a British vessel, was sunk by a German submarine with the loss of 1,198 lives, including 128 Americans. Disclosures of German espionage and sabotage in the United States later in the year, unrestricted submarine warfare by Germany as of February 1917, and March revelations of German intrigue to form an alliance with Mexico contributed to the President calling a special session of Congress on April 2, when he asked for a declaration of war, which was given final approval four days later.[40]

As Wilson led the nation into war, the "preponderance of his crisis authority," commented Clinton Rossiter, "was delegated to him by statutes of Congress." It was a new style in the exercise of emergency power.

> Confronted by the necessity of raising and equipping a huge army to fight overseas rather than by a sudden and violent threat to the Republic, Wilson chose to demand express legislative authority for almost every unusual step he felt impelled to take. Lincoln had shown what the office of the President was equal to in crises calling for solitary executive actions. Now Wilson was to show its efficacy as a crisis instrument working along with the legislative branch of the government. The basis of Lincoln's power was the Constitution, and he operated in spite of Congress. The basis of Wilson's power was a group of statutes, and he cooperated with Congress.[41]

The President also exercised certain discretionary authority in addition to that provided by statute, but he did so in a manner which generally did not antagonize the legislature. For example, he armed American merchantmen in February 1917; created a propaganda and censorship entity in April 1917—the Committee on Public Information—which had no statutory authority for its limitations on the First Amendment; and he created various emergency agencies under the broad authority of the Council of National Defense, which had been statutorily mandated in 1916.[42]

"Among the important statutory delegations to the President," recounted Rossiter, "were acts empowering him to take over and operate the railroads and water systems, to regulate and commandeer all ship-building facilities in the United States, to regulate and prohibit exports, to raise an army by conscription, to allocate priorities in transportation, to regulate the conduct of resident enemy aliens, to take over and operate the telegraph and telephone systems, to redistribute functions among the executive agencies of the federal government, to control the foreign language press, and to censor all communications to and from foreign countries."[43]

Although Rossiter thought "limitations on American liberty in World War I were ridiculously few," others strongly disagreed.[44] His mentor and subsequent faculty colleague, Robert E. Cushman, for example, proffered that "the record of our behavior with respect to civil liberties during World War I is not one in which the thoughtful citizen can take much pride or satisfaction."[45] Although Congress, per-

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[40] 40 Stat. 1.

[41] Rossiter, *Constitutional Dictatorship*, p. 242.

[42] Concerning the Committee on Public Information, see Stephen L. Vaughn, *Holding Fast the Inner Lines: Democracy, Nationalism, and the Committee on Public Information*(Chapel Hill, NC: University of North Carolina Press, 1980); concerning the Council of National Defense, its mandate may be found at 39 Stat. 649–650 and its operations are discussed in Grosvenor B. Clarkson, *Industrial America in the World War: The Strategy Behind the Line 1917–1918* Boston, MA: Houghton Mifflin, 1923); also see, generally, William Franklin Willoughby, *Government Organization in War Time and After* (New York: D. Appleton, 1919).

[43] Rossiter, *Constitutional Dictatorship*, p. 243.

[44] *Ibid.*, p. 253.

[45] Robert E. Cushman, "Civil Liberty After the War," *American Political Science Review*, 38 (February 1944): 6; also see Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1941), especially Part I; Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W. W. Norton, 1979).

haps with a view to self-protection, refused to give the President authority to censure the American press, it did enact other laws, at Wilson's request, to truncate freedom of expression. Chief among these was the Espionage Act to regulate the mails and punish those using the postal system to disseminate information advocating or urging treason, insurrection, or forcible resistance to federal law, and to punish spies and those making false reports or communications with intent to interfere with armed forces operations or "to promote the success" of the enemy; causing insubordination, disloyalty, mutiny, or refusal of duty in the armed forces; or willfully obstructing armed forces recruitment or enlistment.[46] Another was the Trading with the Enemy Act, which expanded the censorship powers of the Postmaster General and authorized censorship (implemented through a presidential board) of "communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country."[47] A third, enacted in 1918, was the Sedition Act, which amended the Espionage Act, to punish those making false reports or statements with intent to interfere with armed forces operations or "to promote the success" of the enemy; obstructing the sale of war bonds; causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the armed forces; willfully obstructing armed forces recruitment or enlistment; willfully uttering, printing, writing, or publishing "any disloyal, profane, scurrilous, or abusive language" about the American form of government, the Constitution, the armed forces or their uniforms, or the flag, or using any language intended to bring any of these into contempt, scorn, contumely, or disrepute; willfully uttering, printing, writing, or publishing "any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies"; willfully displaying the flag of any foreign enemy; willfully uttering, writing, printing, publishing, or speaking to "urge, incite, or advocate any curtailment" of war production; or supporting or favoring, by word or act, "the cause of any country with which the United States is at war" or opposing the cause of the United States when at war.[48]

By one account, the Department of Justice pursued 2,168 prosecutions under the Espionage Act and the Sedition Act, with 1,055 convictions resulting.[49] In a First Amendment challenge, the Supreme Court unanimously sustained the Espionage Act, Associate Justice Oliver Wendell Holmes laying out, in the opinion of the Court, his famous "clear and present danger" test for determining the limits of First Amendment protection of political speech.[50] A unanimous Court also upheld the Sedition Act shortly thereafter, with Holmes again writing the Court's opinion.[51] Several months later, however, the Court divided 7–2 in another Sedition Act case, with Holmes in the minority.[52]

Among the most zealous administration censors was Postmaster General Albert S. Burleson, who, by one estimate, "exercised his power of censorship with a high hand, excluding from the mails publications which only by far-fetched lines of reasoning could be held to be in violation of the statute."[53] In the view of another analyst, "Burleson used censorship as a bludgeon with which to destroy the left-wing press."[54] For example, "about sixty Socialist papers lost their second-class mailing privileges," and "[m]any lesser papers ceased publication."[55]

The Wilson Administration also engaged in secret surveillance of the American populace, using the army and a private citizen organization—the American Protective League—in these efforts, giving special attention not only to Socialist, labor, and pacifist organizations, but also to African-American groups.[56]

In November 1918, Republican majorities were elected to both houses of Congress, and an armistice was signed in Europe, bringing a cessation of warfare. As peace

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[46] 40 Stat. 217.
[47] 40 Stat. 411.
[48] 40 Stat. 553.
[49] Harry N. Scheiber, *The Wilson Administration and Civil Liberties, 1917–1921*(Ithaca, NY: Cornell University Press, 1960), pp. 61–63.
[50] *Schenck*v. *United States*, 249 U.S. 47 (1919).
[51] *Debs*v. *United States*, 249 U.S. 211 (1919).
[52] *Abrams*v. *United States*, 250 U.S. 616 (1919).
[53] Carl Brent Swisher, *American Constitutional Development*(Boston, MA: Houghton Mifflin, 1943), p. 610.
[54] Scheiber, *The Wilson Administration and Civil Liberties, 1917–1921*, p. 32.
[55] Dorothy Ganfield Fowler, *Unmailable: Congress and the Post Office*(Athens, GA: University of Georgia Press, 1977), p. 115.
[56] See Mark Ellis, Race, War, and Surveillance: African Americans and the United States Government During World War I (Bloomington, IN: Indiana University Press, 2001); Joan M. Jensen, *Army Surveillance in America*, 1775–1980 (New Haven, CT: Yale University Press, 1991); Joan M. Jensen, *The Price of Vigilance* (Chicago, IL: Rand McNally, 1968); Theodore Kornweibel, Jr., *Seeing Red: Federal Campaigns Against Black Militancy* (Bloomington, IN: Indiana University Press, 1998).

negotiations, with Wilson participating, began in Paris in mid-January, many temporary wartime authorities began to expire; most of the remaining war statutes and agencies were terminated by an act of March 3, 1921.[57]

The Great Depression

In his final state of the union message, transmitted on December 4, 1928, President Calvin Coolidge advised the legislators that no previous Congress "has met a more pleasing prospect than that which appears at the present time," and concluded that the "country can regard the present with satisfaction and anticipate the future with optimism."[58] One year later, the dreamworld envisioned by Coolidge vanished and was replaced by a nightmare. When the new President, Herbert Hoover, called a special session of Congress on April 15, 1929, to deal with farm relief and a limited revision of the tariff, the stock market evidenced nervousness. Prices continued to rise during the summer months; individual issues did well; and speculation in securities continued. However, as prices rose, so too did the volume of speculation. When the increases in the brokers' loans were criticized, there was sharp response against such "prophets of doom." Nevertheless, it was the twilight of an illusion which came to an abrupt end on October 24, 1929, beginning with an incredible deluge of selling in the stock market. Much of it was probably forced selling, necessitated by "the beautifully contrived system whereby the stock gambler whose margin was exhausted by a fall in the market was automatically sold out," and "became a beautifully contrived system for wrecking the price structure." Panic ensued. "In poured the selling orders by hundreds and thousands; it seemed as if nobody wanted to buy; and as prices melted away, presently the brokers in the howling melee of the Stock Exchange were fighting to sell before it was too late."[59] Rapidly, it became too late.

Economic crisis was not new to America. The country had experienced financial setbacks of nationwide proportion in 1857, 1875, and 1893. History, however, was an enemy in the devising of strategy to deal with the depression of 1929. The periods of economic difficulty of the past were but a tumble when compared with the plunge of the Great Depression. This was the first problem experienced by those attempting to rectify the plight of the country: they did not recognize the ramifications of the situation or the extent of damage done and continuing to be done. Perhaps, too, the administrative machinery was not available or sufficiently developed to halt the downward economic spiral. It may have been that the President's philosophy of government was inadequate for meeting the exigency.[60] In the face of all efforts to halt its progress, the economic disaster continued to devastate American society.

The depression demoralized the nation: it destroyed individual dignity and self-respect, shattered family structure, and begged actions which civilized society had almost forgotten. In brief, it created a most desperate situation, ripe for exploitation by zealots, fanatics, or demagogues. It also created an emergency which, unlike exigencies of the past, dealt a kind of violence to the public that neither armed forces nor military weaponry could repel. It was an new type of crisis leading to a broad extension of executive power.

In 1932, a malcontent and despairing electorate voted against Herbert Hoover. Although a dedicated public servant of demonstrated ability, Hoover was replaced with Franklin D. Roosevelt, who came to the presidency from the governorship of New York and previous service as Assistant Secretary of the Navy during the Wilson Administration. The vice presidential nominee of the Democratic party in 1920, he was struck down by a severe attack of infantile paralysis in 1921, but remained politically active and made a dramatic nomination speech endorsing Al Smith at the Democratic national convention of 1924. He again put Smith in nomination as the party's presidential candidate in 1928. Smith won the nomination, but lost the election; Roosevelt was elected governor of New York.

In his inaugural address, the new President was eloquent, telling the American people "that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." More important, on the exertion of leadership during crisis, he expressed hope that the normal balance of executive and legislative authority would prove to be adequate "to meet the unprecedented tasks before us," but acknowledged that "tem-

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[57] 41 Stat. 1359.

[58] Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790–1966*, Vol. 3 (New York: Chelsea House/Robert Hector, 1966), p. 2727.

[59] Frederick Lewis Allen, Since Yesterday: *The Nineteen-Thirties in America* (New York: Harper and Brothers, 1940), pp. 23–24; also see John Kenneth Galbraith, *The Great Crash, 1929* (Boston, MA: Houghton Mifflin, 1954).

[60] See Gene Smith, *The Shattered Dream: Herbert Hoover and the Great Depression*(New York: William Morrow, 1970).

porary departure from that normal balance" might be necessary. "I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require," he said, but, in the event Congress did not cooperate "and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me"—using "broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."[61]

The day after his inauguration, Roosevelt called for a special session of Congress. When the proclamation for the gathering was issued, no purpose for the March 9 assembly was indicated. Nonetheless, the President's party enjoyed overwhelming majorities in the House (310–117) and Senate (60–35). Roosevelt had arrived in Washington with drafts of two proclamations, one calling for the special session of Congress and the other declaring a so-called "bank holiday," which would temporarily close the nation's banks and restrict the export of gold by invoking provisions of the wartime Trading With the Enemy Act.[62] The bank holiday proclamation was issued on March 6. Between the evening of the inauguration and the opening of Congress, Roosevelt's lieutenants, aided by Hoover's Secretary of the Treasury, Ogden Mills, drafted an emergency banking bill. When Congress convened, the House had no copies of the measure and had to rely upon the Speaker reading from a draft text. After 38 minutes of debate, the House passed the bill. That evening, the Senate followed suit. The President then issued a second proclamation, pursuant to the new banking law, continuing the bank holiday and the terms and provisions of the March 6 proclamation.

Thereafter ensued the famous Hundred Days when the 73rd Congress enacted a series of 15 major relief and recovery laws, many of which provided specific emergency powers to the President or broad general authority to address the crisis gripping the nation. The Emergency Banking Relief Act, for example, authorized the President to declare a condition of national emergency and, "under such rules and regulations as he may prescribe," regulate banking and related financial matters affecting the economy. This statute also continued the Chief Executive's authority to suspend the operations of member banks of the Federal Reserve System.[63] Under the authority of the Civilian Conservation Corps Reforestation Relief Act, the President was granted broad power "to provide for employing citizens of the United States who are unemployed, in the construction, maintenance, and carrying on of works of a public nature in connection with the forestation of lands belonging to the United States or to the several States." Authority also was granted to house, care for, and compensate such individuals as might be recruited to carry out programs established pursuant to the act.[64] After declaring the existence of a national emergency with regard to unemployment and the disorganization of industry, the National Industrial Recovery Act authorized the President to establish an industrial code system and a public works program to facilitate the restoration of prosperity. The President could establish administrative agencies to carry out the provisions of the act, and might delegate the functions and powers vested in him by the statute to those entities.[65]

Although Congress was willing to provide President Roosevelt emergency authority to bring about the economic recovery of the nation, the Supreme Court soon indicated that some legislative responses to the depression did not pass constitutional muster. The National Industrial Recovery Act was struck down in 1935 for making unconstitutional delegations of legislative power to the President and, in one case, as well, for improperly relying upon the interstate commerce clause to regulate local commerce. Furthermore, the Court was not swayed by the government's contention that the legislation was justified by the national economic emergency.[66] The following year, in a 6–3 decision, the Court declared a tax provision of the Agricultural Adjustment Act an invasion of the reserved powers of the states, a violation of the 10th Amendment.[67] These rulings prompted the President to propose an enlargement of the Court's membership in 1937, a proposition about which many Democratic Members of Congress had misgivings. The Court, however, suddenly signaled a change of thinking which produced a new majority more favorably inclined toward

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[61] Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 2: The Year of Crisis, 1933*(New York: Random House, 1938), pp. 11, 15.

[62] Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston, MA: Houghton Mifflin, 1959), p. 4.

[63] 48 Stat. 1.

[64] 48 Stat. 22.

[65] 48 Stat. 195.

[66] See *Panama Refining Co.*v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[67] See *United States*v. *Butler*, 297 U.S. 1 (1936).

statutes supporting the administration's recovery efforts.[68] Moreover, by the end of 1940, Roosevelt had appointed five new justices to the Court.

World War II

The formal entry of the United States into World War II occurred on December 8, 1941, with a declaration of war against Japan in response to the attack on Pearl Harbor in the Hawaiian Islands that had occurred the previous day.[69] Three days later, on December 11, war was declared against Germany and Italy.[70] As a result of the 1940 elections, President Roosevelt had been returned to office for an unprecedented third term, and his party held large majorities in the House (267–162) and Senate (66–28).

During Roosevelt's first and second presidential terms (1933–1940), as totalitarian regimes began threatening the peace of Europe and Asia, Congress adopted a series of Neutrality Acts restricting arms shipments and travel by American citizens on the vessels of belligerent nations.[71] Two months after war commenced in Europe in September 1939, Congress, at the President's request, modified the neutrality law by repealing the arms embargo and authorizing "cash and carry" exports of arms and munitions to belligerent powers.[72] Some advanced weapons—aircraft carriers and long-range bombers—were procured for "defensive" purposes. More bold during the period of professed neutrality was the President's unilateral transfer of 50 retired American destroyers to Great Britain in exchange for American defense bases in British territories located in the Caribbean. The President also negotiated a series of defense agreements whereby American troops were either stationed in foreign territory or were utilized to replace the troops of nations at war in nonbelligerent tasks so that these countries might commit their own military personnel to combat. Such was the case with Canada when, in August 1940, it was announced that the United States Navy, in effect, would police the Canadian and American coasts, providing mutual defense to both borders. Canadian seamen would, of course, be released to aid the British navy. In April 1941, American military and naval personnel, with the agreement of Denmark, were located in Greenland. In November, the Netherlands concurred with the introduction of American troops into Dutch Guiana.

With the declarations of war and the impending international crisis, Roosevelt, in Rossiter's estimate, became "a President who went beyond Wilson and even Lincoln in the bold and successful exertion of his constitutional and statutory powers." Congress "gave the President all the power he needed to wage a victorious total war, but stubbornly refused to be shunted to the back of the stage by the leading man." Exemplary among the various congressional committees playing a watchdog role during the war was the Senate Special Committee to Investigate the National Defense Program.[73] The Supreme Court "gave judicial sanction to whatever powers and actions the President and Congress found necessary to the prosecution of the war, and then *post bellum* had a lot of strong but unavailing things to say about the limits of the Constitution-at-War."[74]

While the First War Powers Act authorized the censorship of American communications with foreign countries, the domestic press and radio were controlled by a strictly voluntary and extra-legal Censorship Code.[75] A few seditious or nearly-seditious publications, like Father Charles E. Coughlin's *Social Justice*, were suppressed by the Postmaster General. The most serious civil liberties violation to occur during the war—although it was not widely criticized at the time—was the internment, at the President's order, of some 110,000 Japanese Americans, an estimated 70,000 of whom were legal citizens of the United States, in special camps. Congress supported the internment directive by legislating a misdemeanor penalty for any action in violation of the restrictions laid down by the President, the Secretary of War, or des-

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[68] See *West Coast Hotel Co.*v. *Parrish*, 300 U.S. 379 (1937).
[69] 55 Stat. 795.
[70] 55 Stat. 796, 797.
[71] 49 Stat. 1081, 1152; 50 Stat. 121.
[72] 54 Stat. 4.
[73] See Donald H. Riddle, *The Truman Committee: A Study in Congressional Responsibility*(New Brunswick, NJ: Rutgers University Press, 1964); Harry A. Toulmin, Jr., *Diary of Democracy: The Senate War Investigating Committee* (New York: Richard R. Smith,1947); Theodore Wilson, "The Truman Committee, 1941," in Arthur M. Schlesinger, Jr., and Roger Bruns, eds., *Congress Investigates: A Documented History, 1792–1974*, Vol. 4 (New York: Chelsea House, 1975), pp. 3115–3136.
[74] Rossiter, *Constitutional Dictatorship*, p. 265; for a catalog of emergency powers granted to the President during the period of the war, see U.S. Library of Congress, Legislative Reference Service, *Acts of Congress Applicable in Time of Emergency*, Public Affairs Bulletin 35 (Washington: Legislative Reference Service, 1945).
[75] 55 Stat. 838.

ignated military subordinates.[76] The Supreme Court supported the constitutionality of these actions.[77] The Court, meeting in special session, also rejected the habeas corpus applications of seven German saboteurs captured on American soil and prosecuted in secret proceedings by a military tribunal. Six of the prisoners were executed a little more than a week later.[78] When the presidency of Franklin D. Roosevelt came to an end on April 12, 1945, with his sudden death in Warm Springs, Georgia, his experience in the exercise of emergency powers during wartime had been one of little restraint by Congress or the federal courts, and, with the significant exception of the forced internment of the Japanese Americans, of respect for constitutionally guaranteed rights.

Homeland Security

Nine months after his inauguration, President George W. Bush was confronted by an emergency resulting from terrorist attacks, using hijacked passenger airliners, on the World Trade Center in New York City and the Pentagon in northern Virginia. At the time of the attacks, the 107th Congress was in session, the President's party having majority control of the House (221–212), but minority status in the Senate (49–50). While the President would request congressional enactment of some remedial legislation to address the emergency, he also had available a rich legacy of statutory powers to draw upon. These included, for example, the response and recovery program authorities of the Federal Emergency Management Agency,[79] as well as standby provisions which could be selectively activated pursuant to the National Emergencies Act with a national emergency declaration.[80]

A few hours after the attacks on the World Trade Center and the Pentagon occurred, American armed forces around the world were brought to the highest level of readiness; the Capitol complex and the West Wing of the White House were evacuated; all aircraft flights within the United States were suspended; most federal employees around the country were sent home; all domestic financial markets were closed; and military defenses for Washington and New York were strengthened. A few days later, President Bush formally declared a national emergency and activated provisions of law authorizing the call up of the Ready Reserve and other retired or separated armed services personnel.[81] That same day, Congress completed action on a $40 billion emergency assistance package for counterterrorism and rescue efforts,[82] and enacted a joint resolution authorizing the President to use all necessary force in retaliation for the terrorist attacks.[83] On September 19, President Bush ordered the deployment of more than 100 advanced aircraft to the Persian Gulf region as part of the initial buildup of U.S. military forces poised for retaliatory action for the September 11 attacks. Four days later, the President again declared a national emergency, invoked the International Emergency Economic Powers Act, and ordered its implementation to begin freezing the assets of individuals and organizations believed to be involved in activities threatening U.S. security interests.[84] On October 7, American and British aircraft and warships began air assaults against suspected terrorist bases and targets in Afghanistan.

To facilitate the coordination of homeland security policy and its implementation, President Bush issued an October 8 order establishing the Office of Homeland Security (OHS) within the Executive Office of the President and creating the Homeland Security Council.[85] Later that day, he appointed former Pennsylvania Governor Tom Ridge to head OHS. On October 26, the President signed the USA Patriot Act giving law enforcement officials new powers to investigate and detain suspected terrorists, including controversial surveillance authority.[86] A few days later, a new Department of Justice rule authorizing the Bureau of Prisons to monitor communications between suspected terrorist inmates and their attorneys prompted protests from

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[76] 56 Stat. 173.

[77] See *Hirabayashi*v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944); Ex parte Endo, 323 U.S. 283 (1944); Peter Irons, *Justice at War* (New York: Oxford University Press, 1983).

[78] *Ex parte Quirin*, 317 U.S. 1 (1942).

[79] See 42 U.S.C. 5121 et seq.

[80] See 50 U.S.C. 1601 et seq.

[81] Proclamation 7463, *Federal Register*, 66 (Sept. 18, 2001): 48197–48199.

[82] 115 Stat. 220.

[83] 115 Stat. 224.

[84] E.O. 13224, *Federal Register*, 66 (Sept. 25, 2001): 49079–49082, invoking 50 U.S.C. 1701 et seq.

[85] E.O. 13228, *Federal Register*, 66 (Oct. 10, 2001): 51812–51817.

[86] 115 Stat. 272.

trial lawyers, the American Bar Association, and civil liberties organizations.[87] Simultaneously, Department of Justice detentions, refusals to name publicly those detained, and cessation of the issuance of detention tallies also spawned objection and counter tactics.[88] So, too, did the President's November 13 military order authorizing the creation of special military tribunals to try suspected international terrorists and their collaborators.[89] However, these matters appeared to be the only ones resulting in any serious conflict between the President and Congress concerning his response to the terrorism emergency during the six months after the September 11 attacks.

RETROSPECTIVE

As the historical record recounted here suggests, Congress and the federal courts have not been very effective counterweights to exercises of emergency power by the President.[90] Judges, as was acknowledged by the Supreme Court in the *Milligan* case, may defer, delay, or rule narrowly on presidential emergency actions until the period of crisis has passed. Congress also may choose this course as well, as it did when it legislatively terminated unnecessary war statutes and agencies in 1921. In addition, when enacting legislation vesting emergency authority in the executive, Congress may include a sunset provision automatically terminating the statute on the occasion of a particular event or condition marking the end of the emergency, such as the establishment of an armistice or the ratification of a peace treaty. For many years, Congress has legislated standby delegations of emergency authority which could be activated with a formal national emergency declaration. In 1976, with the National Emergencies Act, Congress created procedural arrangements for such declarations, limited their effects to selective activation of standby authorities, and provided itself with a means to cancel unwarranted national emergency declarations or inappropriate activations of standby authorities. Finally, through its power of the purse, Congress may restrain or scale down executive actions responding to a national emergency. This was done abruptly and drastically after the November 1918 armistice in Europe, with unfortunate consequences for American national defense programs; a better model may be found in congressional support of demobilization and reconversion of the economy to peacetime conditions in 1944, 1945, and the immediate years after the end of World War II. Ultimately, the Constitution and the form of government it guarantees have survived many national emergencies in the life of the nation, the three branches not always being in equal check and balance with one another during these periods of crisis, just as they may not be in less perilous times.

Mr. CHABOT. Mr. Ornstein, you are recognized for 5 minutes. Thank you.

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[87] See *Federal Register*, 66 (Oct. 31, 2001): 55061–5506; George Lardner, Jr., "U.S. Will Monitor Calls to Lawyers," *Washington Post*, Nov. 9. 2001: A1, A16; Jerry Seper, "Criminal Defense Lawyers Object to Eavesdropping Rule," *Washington Times*, Nov. 10, 2001: A2; George Lardner, Jr., "ABA Urges Ashcroft to Kill Order," *Washington Post*, Jan. 4, 2002: A10.

[88] See Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, Nov. 9, 2001: A16; Dan Eggen, "About 600 Still Detained in Connection with Attacks, Ashcroft Says," *Washington Post*, Nov. 28, 2001: A16; Jerry Seper, "Ashcroft Won't Bend on Arrests," *Washington Times*, Nov. 28, 2001: A1, A8; "Rights Groups Sue for Detainee Details," *Washington Post*, Dec. 6, 2001: A4; Dan Eggen, "Delays Cited in Charging Detainees," *Washington Post*, Jan. 15, 2002: A1, A8; Dan Eggen, "Long Wait for Filing of Charges Common for Sept. 11 Detainees," *Washington Post*, Jan. 19, 2002: A12; Hanna Rosin, "Groups Find Ways to Get Names of INS Detainees," *Washington Post*, Jan. 31, 2002: A16; Hanna Rosin, "Lawsuit Filed Over Immigration Hearings' Closing," *Washington Post*, Jan. 30, 2002: A7.

[89] See *Federal Register*, 66 (Nov. 16, 2001): 57833–57836; Joseph Curl, "President Approves Trials by Military," Washington Times, Nov. 14, 2001: A1, A10; George Lardner, Jr., and Peter Slevin, "Military May Try Terrorism Cases," *Washington Post*, Nov. 14, 2001: A1, A12; Peter Slevin and George Lardner, Jr., "Bush Plan for Terrorism Trials Defended," *Washington Post*, Nov. 15, 2001: A27; George Lardner, Jr., "Democrats Blast Order on Tribunals," *Washington Post*, Nov. 29, 2001: A22; George Lardner, Jr., "Legal Scholars Criticize Wording of Bush Order," *Washington Post*, Dec. 3, 2001: A10; Frank J. Murray, "Justice to Use FDR Precedent for Military Tribunals," *Washington Times*, Dec. 5, 2001: A1, A11.

[90] A notable exception, outside of the emergency periods considered here, is *Youngstown Sheet & Tube Co.*v. *Sawyer*, 343 U.S. 579 (1952).

STATEMENT OF NORMAN J. ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

Mr. ORNSTEIN. Thanks, Mr. Chairman; and again I want to thank you for holding this hearing and thank Mr. Nadler and Mr. Baird for his resolute leadership on this.

It is clear to me that Congress must act on this in some fashion. It is not a matter of whether. It is a question of how. But we have now seen how dangerously close we have come to the possibility of a disaster. If you believe, as I do and as I think we all do, in the critical role of Congress in making policy in our system of governance, especially at a time of emergency, that while there may be options, including a benign form of martial law if you elect the executive act when Congress can't, that we need to have a Congress around, and we have got to find a way to deal with it.

Now, I don't like constitutional amendments as a general rule. I have actually been in this room a few times testifying against several that I believed were ill-considered; and I also very much embrace the notion, as many other Members do—I had a long conversation with Vic Snyder about this—that this is the people's House, that nobody has served here who hasn't been elected. But it is also a bedrock of the Constitution that this is a House based on population through the States. That, of course, was a critical element of the great compromise that created the Union, and if we ended up with a House that operated for a period of time with most of the States unrepresented and most of the population unrepresented, that also strikes a very serious blow at the basic nature of this institution.

Now, having said that, I, as Representative Baird, went through the options and came myself reluctantly to the conclusion that we needed a constitutional amendment that would provide for temporary appointments to the House.

Now, having said that, it is not an easy thing to deal with. There are a lot of very, very tricky questions here. We want an amendment to be as concise as possible.

I do not believe that we can draft an amendment and bring it forward, however, without also having draft language for implementing legislation that deals with some of these knotty questions, particularly how do you determine the threshold for triggering an amendment and who makes that determination and how do you define disability and what do you do with Members who are disabled for a brief period of time and then are ready to resume their service and how do you determine that as well?

You clearly do not want to be in a situation where you trigger an amendment, you declare an individual disabled, 2 weeks later that person is ready to come back to the job, and you say, sorry, we have a replacement for you for a 90-day period or whatever. Now, I think that we can deal with both of those, and I have made in my testimony a couple of suggestions that I hope you will consider.

One in particular that I would mention now, and that is the issue of how you trigger the provisions here. Representative Baird used a numerical figure. Senator Specter picks a different number. I don't think the issue is so much the numbers.

First of all, we would have to decide who would decide whether Members are dead or disabled; and if we had a Capitol hit by an airplane, it might take us days or weeks to even figure that out.

You also don't want this decision to even remotely come close to some kind of political manipulation. So what I suggest in my testimony is that governors in the States make a determination after a disaster has occurred as to whether a majority of the Members of their own States' delegation are dead, missing or disabled. Then when a majority of the governors, 26 governors, have made such declarations—so a majority of the governors, each indicating that a majority of the Members are dead or disabled, an amendment would be triggered and then they would be empowered to make temporary appointments which I think should be probably for a period of 90 days.

Then I have a whole series of other suggestions in terms of how we define disability, Members themselves or otherwise.

I have actually come to believe that the problem of disability may be the more serious one here. Because with the possibility now, maybe even a greater possibility of things like an anthrax attack, a smallpox attack, chemical or biological, we could easily end up with hundreds of Members quarantined or unable to serve for a period of time when the quorum requirement would really become a much bigger problem.

Now, I have got more I won't get into. But let me also say to you that I, in the aftermath of all of this, convened a small working group of top constitutional and congressional scholars, including some of your former colleagues as well, to look into other options. There are other options to consider.

Don Wolfenburger, a longtime distinguished staffer of the Rules Committee here, drafted up a possible way of dealing with this by statute and rule, including rules that might define the nature of a quorum in a different fashion.

Michael Davidson, who is a very distinguished counsel in the Senate, came up with a straightforward amendment parallel to what we have with the Senate that would be a little bit simpler and would cut right to the chase.

Then, Elton Fry, now with the Council on Foreign Relations, made a rather innovative suggestion of having Members designate their own successors for temporary periods of time.

All of these are things that you ought to consider, but you need to consider them, and I believe the responsible thing to do is to act on something expeditiously.

Thank you very much.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Ornstein follows:]

PREPARED STATEMENT OF NORMAN J. ORNSTEIN

Mr. Chairman and members of the committee, I speak here today in favor of a constitutional amendment to preserve the continuity of the fundamental role of the House of Representatives in the constitutional governance of the United States.

No one will ever forget the horrors of September 11th. Thousands of innocent lives were lost at the World Trade Center, Pentagon, and on the planes. But as horrific as September 11th was, it could have been worse, were it not for the heroism of the passengers of United flight 93, who brought down the plane before it could reach its target. While we may never know for certain the destination of that plane, it

is clear it was headed for DC, and that the White House and Capitol building were prime targets.

Imagine if flight 93 had taken off on time, instead of 41 minutes late. The brave passengers would not have learned about the earlier suicide attacks from cell phone conversations with loved ones, and they would not likely have thought to rush the cockpit. Imagine the plane approaching the Capitol building at about the same time as American Airlines flight 77 crashed into the Pentagon at 9:41. My understanding is that the House floor was fairly crowded that morning. Many other members were in the building, in leadership offices, or on their way to the chamber. With no warning of the attack on the Pentagon, hundreds of members of Congress might have been killed or severely injured, along with many more staff. With hundreds dead and perhaps hundreds of others in burn units in hospitals, Congress would likely have been without a quorum, without a building, without the ability to function.

In the days after September 11th, the president and Congress rallied the nation. Congress acted upon important legislation, including a joint resolution authorizing the use of military force (signed September 18), emergency aid for the rescue efforts, transportation security, funding for the war on terrorism, compensation of victims, money for rebuilding, and measures to enhance the ability of law enforcement to detect terrorism. Now it is true that if only a handful of members survived a horrific terrorist attack, Congress might still have been able to assemble a quorum-made up of half the members elected, sworn and living—and function to pass laws like the ones above. And, to be sure, even without a Congress, America would have functioned and responded to the emergency, as long as the president or someone in the line of presidential succession was around to act. But it is hard to argue that at a time of maximum national peril, it would be desirable either to have laws made by an unrepresentative handful of lawmakers, or via a benign form of martial law.

THE PROBLEM: HOW A CATASTROPHIC ATTACK MIGHT CRIPPLE CONGRESS

Why is it that a debilitated Congress might be unable to reconstitute itself after a catastrophic attack? The problem starts with the constitutional quorum requirement. The Constitution says that a majority of each house "shall constitute a quorum to do business." On its face, it would seem that if 218 members of the House were not able to answer a quorum call then the House would be unable to function. In practice this requirement is somewhat less stringent. Since the Civil War, parliamentarians in the House and Senate have interpreted this provision to mean a majority of the sworn and living members. But even under this more lenient interpretation a quorum might not be met if a significant number of members were incapacitated or unable to answer a quorum call.

Some argue that the quorum requirement might not ever arise, for no member would object that there is an absence of a quorum under such trying circumstances. Perhaps, but one objection is all it takes. And even if no one suggested an absence of a quorum, it is not a good situation to proceed for months on the fiction that there is a quorum when one cannot be mustered, and when any member could shut down the body with one objection.

There is another possibility to consider—a case in which a quorum is achievable, but with tiny numbers. Take an extreme case: that 430 members of the House of Representatives are killed. According to the established precedent, a quorum would be the majority of the sworn and living members—in this case, 3 members. Would anyone want a House of Representatives to operate for months with three members passing important laws—perhaps including a declaration of war? Or thirty members, or even one hundred? Even in a much less severe situation, where 100 members are unable to perform their duties, would we want a Congress to operate with so many vacancies, with some states having no representation?

This problem would be largely alleviated if Congress could be replenished quickly. But under our existing system, it cannot. There are two problems: (1) the lack of a constitutional mechanism for filling vacancies in the House of Representatives in the case of a very large number of vacancies; and (2) the fact that Congress has not chosen to address the question of disabled or incapacitated members, especially the case of the incapacitation of large numbers of members.

On the first problem, our constitution treats vacancies in the Senate and the House differently. The constitution allows state legislatures to empower their governors to make an immediate temporary appointment to fill a Senate vacancy, and the appointment lasts until a special election is held. House vacancies are filled only by special election. Typically, special elections following unanticipated vacancies are held between 90 and 120 days after a vacancy occurs. But depending on the particular state law and when the vacancy occurs, a seat might lie vacant for six months (See Appendices I and II).

Under normal circumstances, there is virtue in the way the House fills vacancies. The House is the institution of government closest to the people. It can rightly take pride in the fact that no member has ever set foot in its chamber who was not elected directly by the people. Also, there is no great harm to the body if a handful of seats are vacant at any given time. A body of 435 voting members is not substantially affected by a few vacancies.

But the normal mode of filling House vacancies could be disastrous under circumstances in which the House could not field a quorum. First, no new vice president could be confirmed. In the case of the demise or promotion of the vice president, a new vice president requires confirmation by votes of both the House and Senate. Second, no appropriations could be made. Third, no ordinary legislation could be passed, including a declaration of war. Fourth, a non-functioning House might also disable the Senate. If the Capitol or a wider area of Washington were not usable, the Constitution requires the assent of both houses to move the location of Congress. In such a scenario, the Senate might not be able to reconvene which would mean that no appointments could be confirmed, nor treaties ratified. Finally, a disabled Congress would be a psychological blow to the American people. We should not underestimate the sense of stability and purpose we were able to maintain after September 11th because we were able to operate all of the institutions of our government under normal constitutional procedures.

The second issue that Congress must grapple with is the question of incapacity of its members in times of a catastrophe. Under normal circumstances, neither house of Congress attempts to determine the capacity of individual members. Many members have stayed in their elected positions for months or longer while comatose or clearly unable to perform their normal duties. There has been only one recent case of a seat declared vacant while held by a living member, Gladys Noon Spellman (D-MD.) But the Spellman case is extraordinary. Spellman fell into a deep and irreversible coma on October 21, 1980 while campaigning for re-election. Her name remained on the ballot as a candidate for re-election, and she was voted in by the people of her district in Maryland. On February 23, 1981, the House passed H. Res. 80 declaring the seat vacant because of her "absence and continuing incapacity."

A somewhat parallel case occurred in 1972 with House Majority Leader Hale Boggs (D-LA) and congressman Nick Begich (D-AK). Both were lost in a plane crash. As the plane crash occurred close to the next election, their names remained on the ballot and certificates of election were issued showing their election. While the bodies were never found, the seats were declared vacant after an Alaska court determined officially that they were presumed to have died.

On the other side, there have been many cases of members of Congress who have not been able to show up to vote or perform their duties, but who have remained in office. Senator Carter Glass in the 1940s is one example. As is Senator Karl Mundt, whose committee slots were declared vacant by the Republican Conference, but who remained formally in his seat until his death in late 1974 despite total incapacity for a considerable period of time. The practice has been that an incapacitated member is not removed unless that person stands for reelection, wins and cannot be seated for a new term because of the incapacity.

Ignoring incapacity is understandable for a Congress operating during normal times. As with the vacancy provision, the Congress will not cease functioning if a few members are not able to perform their duties. And there is the danger of abuse of an incapacity provision, with congressional leaders or governors tempted for political or other reasons to try to replace fit or mildly ill members by declaring them incapacitated.

But in the case of a catastrophic event, the problem of incapacity takes on a new face. The grim realities of the war on terrorism and the nature of possible chemical or biological attacks on Washington and Congress makes it perhaps more likely that Congress will have massive incapacitation than massive death. Even if no member died in an attack, if 218 members were seriously injured, the House would be unable to meet its quorum requirement.

Of course, this is a very delicate problem. How do we define incapacity? What about temporary incapacity? What if large numbers of members are in burn units, but could recover? What if hundreds of members are quarantined because of a smallpox or anthrax attack? If the recovery period took months, Congress might still be paralyzed. But if incapacitated members are replaced, even temporarily, great care should be taken to ensure that they could return smoothly to their duties as duly elected representatives if and when they regain their capacity to carry out their jobs.

THE OUTLINES OF A SOLUTION

As a general matter, I do not like constitutional amendments. Constitutional amendments truly should be the response of last resort. Many of the problems that proposed constitutional amendments address can and should be handled legislatively. Unlike laws, constitutional amendments are close to irreversible, and there are often unintended consequences. In this case, however, I have come reluctantly to the conclusion that a constitutional amendment is appropriate. Congress needs to create a mechanism for temporary appointments to ensure its continued functioning in the event of a catastrophic act. There are other approaches, which I will discuss below, and the committee should consider them carefully. But my conclusion is that the most effective way to deal with this serious problem is via a constitutional amendment.

Drafting an appropriate constitutional amendment, however, is not easy. First, a constitutional amendment should be as concise and limited as possible, leaving implementing detail to legislation. But that principle means ambiguity and uncertainty in an area of sensitive and vital concern to the American people, and even greater sensitivity to the members of Congress whose lives and careers are directly at stake. So any amendment must address those concerns up front, if only by appending draft legislation to the draft amendment text.

Second, there are several knotty questions that must be resolved by an amendment and accompanying legislation. What is the threshold for triggering the amendment, the level of catastrophe requiring temporary appointments to the House? Who or what determines when that threshold is met? Who makes the temporary appointments? What is their term? Are they renewable? How is "disability" defined, and by whom? Who decides, and how is it decided, when a temporarily disabled member is ready to return to his or her duties?

Fortunately, Representative Brian Baird, who confronted this problem early and did not shrink from its difficult nature, has addressed most of these concerns. His amendment only becomes operative when a very large number of members are killed or incapacitated. It allows for short, temporary appointments followed by special elections. It recognizes the problem of incapacitated members. The outlines of his amendment are sound. I urge you to consider the Baird amendment seriously. But I also urge you to elaborate on it. Let me suggest two ways in which we might stay within the Baird framework, but further improve the product.

First, on the question of incapacity: Representative Baird does not define incapacity in the amendment itself, nor does he say who would judge incapacity. Perhaps this is better left to implementing legislation, but members of Congress would benefit from seeing such legislation before they decide on the merits of the amendment. There are some difficult questions. Who declares incapacity? By what standard? Who decides if a member is recovered? Can a member resume his or her duties if the incapacity is lifted? Would a temporary appointment end if the incapacitated member were fit to return to his or her job? Would a special election be cancelled in such a case? These questions need to be answered during the process of consideration of the constitutional amendment. A working group I convened of constitutional and congressional scholars considered these issues and discussed appropriate language.

Second, on the mechanism triggering the amendment: Representative Baird proposes a reasonable standard by which to judge the need for temporary appointments, one quarter of the House dead or incapacitated. Others, including Senator Arlen Specter, prefer a higher threshold. The numbers may be easier to clarify than the process. The amendment does not address who determines when the threshold has been met. This issue is particularly difficult. In fact, there were several amendments similar to Representative Baird's that were proposed in the 1940s, 1950s and 1960s, several of which passed the Senate overwhelmingly, only to die in the House. In the discussions of these bills, one central question was how to trigger the amendment. Especially in the aftermath of an attack, determining the status of a large number of members would be problematic. Would the House determine when that threshold had been reached? If so, the House might be in total disarray or unable to meet so that it could not reach a determination. Should the president decide, or individual governors?

Here is a suggestion for a balanced and prudent triggering mechanism, that can either be incorporated into the amendment or addressed in accompanying legislation: In the event of a national disaster, each state's governor would make a determination if a majority of his or her state's congressional delegation is dead or incapacitated. If the determination is positive, the governor would sign a proclamation to that effect and send it to the Speaker, the president, the Chief Justice of the Supreme Court, and if none of them or their designees is available, to the senior gov-

ernor in terms of service. When a majority of governors reaches the conclusion that the majority of members in their state delegations are unable to perform their duties in Congress, the amendment would kick in.

This process has several advantages. One, it decentralizes the trigger mechanism and moves it out of Washington, an important consideration if our capital is the target of an attack. Second, because twenty-six governors would have to make a similar determination, it removes the power to trigger temporary appointments from one hand and ensures that no abuse of power for political or other purposes can occur.

OTHER OPTIONS

I have been writing and thinking about this serious problem since September 11. Over the past couple of months, I convened a working group of constitutional, legal and congressional experts. During our deliberations, there was universal acceptance that something had to be done about the problem of maintaining a functioning Congress in the face of an attack. But there were many different views on how to solve the problem. Some were not comfortable with the complexity of an amendment like Baird's. Former Senate Counsel Michael Davidson was among those suggesting a more simple and direct approach. His draft would provide that when vacancies occur in the House, governors shall issue writs of election as they now do. The state legislatures would be authorized, as they are in the case of Senate vacancies, to empower governors to make temporary appointments. But to assure that these appointments are brief, in contrast to the appointment of interim senators, temporary appointments would last no longer than 90 days.

Distinguished constitutional law professor Michael J. Glennon of the University of California, Davis suggested a simple amendment authorizing Congress to deal with mass vacancies by legislation. He has also drafted legislative language to implement such an amendment; this legislation defines incapacity and allows for temporary appointments.

Others thought that many of the issues could be dealt with legislatively, perhaps avoiding the extreme step of a constitutional amendment. Don Wolfensberger, a veteran staff member of the House Rules Committee now at the Woodrow Wilson Center, drafted language that makes the best case for a statutory and rulemaking, not constitutional, approach. There were also some innovative approaches, including Alton Frye's idea that members of Congress could designate in advance their successors in case of their own incapacity. While I prefer the Baird approach, I believe it would be helpful for you to have a sense of the other approaches to further debate on the issue.

Let me outline the approaches that members of our working group proposed:

Baird amendment with Ornstein modifications:

- When a majority of governors declare that a majority of their state's congressional delegation is dead or incapacitated the amendment kicks in.
- In the case of vacancies, governors may make 90-day temporary appointments and schedule a special election.
- In the case of incapacity, a temporary member is appointed until the incapacitated member indicates he or she is recovered and resumes the seat. Or if an incapacitated member dies, a temporary appointment of 90 days is made until the seat is filled by special election.

Simple constitutional amendment. The House will adopt a procedure similar to Senate procedure for filling vacancies:

- When any vacancy occurs (whether there is an emergency or not), state legislatures may empower governors to fill the vacancy with a temporary appointment until a special election can be held.
- Temporary appointments limited to 90 days.

Simple constitutional amendment that gives the Congress the power by statute to deal with mass vacancies and incapacity:

- General amendment grants the power to Congress to deal with mass vacancies.
- Statutory language clarifies issues surrounding temporary appointments, incapacity, etc.

Statutory solution to require states to hold expedited special elections in case of mass vacancies and rulemaking proposal on counting quorums:

- When half the seats in the House are vacant, an emergency procedure kicks in to require each state to hold a special election within 60 days.

- House may declare a member temporarily incapacitated. Such incapacitated members would not count in the determination of the quorum requirement. They would continue to receive full pay and benefits. And they may resume their seats when they declare they are fit, subject to approval of the House.

Statutory language to allow members to designate their own temporary successors in the case of vacancies:

- All members will designate in advance a successor who would serve in the members place in case of death until a special election could be held or in case of a temporary incapacity.

Mr. Chairman, I urge you to consider all these alternatives, and to examine carefully the Baird Amendment and ways to make it workable and achievable. I urge you to act with some dispatch. God willing, we will never have to confront a scenario as horrific as the one we are considering today. But it is your duty to make sure that the country, and its Congress, can function just in case.

Appendix I

Special Elections for the United States House of Representatives in the Cases of Vacancy due to Death of Members from the 105th to the 107th Congresses

Congress	Open Seat	Deceased Representative	Date of Vacancy	Primary Election	General Election	Date Sworn In	Successor	Time to fill vacancy
105th	Texas 28th	Frank Tejada	1/30/97	3/15/97	4/12/97	4/17/97	Ciro D. Rodriguez	77 days
105th	California 22nd	Walter H. Capps	10/28/97	1/13/98	3/10/98	3/17/98	Lois Capps	140 days
105th	California 44th	Sonny Bono	1/5/98	4/7/98	--*	4/21/98	Mary Bono	106 days
105th	New Mexico 1st	Steven Schiff	3/25/98	4/13/1998**	6/23/98	6/25/98	Heather Wilson	92 days
106th	California 42nd	George E. Brown Jr.	7/15/99	9/21/99	11/16/99	11/18/99	Joe Baca	126 days
106th	Virginia 1st	Herbert H. Bateman	9/11/00	--**	11/7/00	1/3/01	Jo Ann Davis	114 days
106th	Minnesota 4th	Bruce F. Vento	10/10/00	9/12/00	11/7/00	1/3/01	Betty McCollum	85 days
107th	California 32nd	Julian C. Dixon	12/8/00	4/10/01	6/5/01	6/7/01	Diane E. Watson	181 days
107th	Virginia 4th	Norman Sisisky	3/29/01	4/29/2001**	6/19/01	6/26/01	J. Randy Forbes	89 days
107th	Massachusetts 9th	John Joseph Moakley	5/28/01	9/11/01	10/16/01	10/23/01	Stephen F. Lynch	148 days
107th	South Carolina 2nd	Floyd Spence	8/16/01	10/30/01	12/18/01	12/19/01	Joe Wilson	125 days
							Average Time to Fill a Vacancy: 117 days	

*Mary Bono won a majority of the vote in the special primary election, eliminating the need for a runoff general election in June of 1998, according to California State Code.

** The State Codes of New Mexico and Virginia do not require special primary elections. These candidates were selected by their parties, according to their states' laws. No primary election was held.

Appendix II

Time Requirements for Filling Vacant House Seats According to State Election Code

(This data is still being gathered. The table is incomplete.)

State	Time between vacancy and general election	Date of primary election	Maximum time between vacancy and regularly scheduled election for states to default to scheduled election (no special election)	Maximum time left in term when no election occurs to fill vacancy
1. Alabama				
2. Alaska	Between 60 and 90 days	At least 30 days after vacancy		
3. Arizona	Between 75 and 100 days	At least 30 days after the vacancy		
4. Arkansas	Avg. 132 days (if no primary, 50 days)	Both parties can wave primary in favor of caucus		
5. California	Between 112 and 119 days	56 days before general		
6. Colorado	Between 75 and 90 days		90 days	
7. Connecticut				
8. Delaware				
9. Florida	Minimum time periods can be waived if Congress is in session	2 special primaries, with at least 2 weeks between them.		No election must occur if the House will not be in session again before the term expires
10. Georgia	30 days min. after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.			
11.Hawaii	At least 60 days*			
12. Idaho				
13. Illinois	115 days max.	50-57 days from vacancy		
14. Indiana				
15. Iowa				
16. Kansas	Between 45 and 60 days after writ of election is issued. The governor must issue the writ within 5 days of the vacancy.		Between 30 and 90 days	
17. Kentucky		No primary, parties decide		
18. Louisiana				
19. Maine	As "soon as reasonably possible" if Congress is in session			No election must occur if the House will not be in session again before the term expires

20. Maryland	72 days min. after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.	36 days after writ of election	Between 40 and 120 days	60 days
21. Massachusetts		35 days before general		
22. Michigan		At least 20 days before general	30 days	
23. Minnesota	33 days maximum when Congress is in session (5 days for writ, 28 days from writ), otherwise in time for the next session.		No special election must occur if the House will not be in session again before the term expires and more than 150 days remain until the next general election.	
24. Mississippi	40 days min. after writ of election is issued. The governor must issue the writ within 60 days of the vacancy.			
25. Missouri		Parties select candidates, no primary		
26. Montana	Between 75 and 90 days	States select	150 days	
27. Nebraska*	4 weeks after the primary (between 48 and 58 days from issuance of the writ of election)	Between 20 and 30 days after the writ of election is issued. The writ is issued at the "earliest practicable time"	There is no special election if Congress will not convene before the next general election.	
28. Nevada				
29. New Hampshire				
30. New Jersey		No primary unless they default to regularly scheduled	Less than 64 days before primary or more than 52 days before general	6 months
31. New Mexico	Between 84 and 91 days	No primary, but parties must certify candidates 56 days before general	If vacancy occurs after primary but before that years election	
32. New York	Between 30 and 40 days *	No primary		
33. North Carolina				
34. North Dakota				
35. Ohio				
36. Oklahoma	Approx. 50 days after writ of election is issued. The governor must issue the writ within 30 days of the vacancy.			

37. Oregon		There is no primary (parties decide) if the special election is called less than 80 days after the vacancy.	61 days	
38. Pennsylvania	At least 60 days after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.			
39. Rhode Island			8 months, unless in the governor's opinion, the public good requires an earlier special election.	
40. South Carolina	Between 120-127 days. Held on the 18th Tuesday after the vacancy occurs.	Held on the 11th Tuesday after the vacancy occurs, and a runoff primary on the 13th Tuesday.	180 days (if the 18th Tuesday after the vacancy occurs is no more than 60 days before the general election.	
41. South Dakota	Between 80 and 90 days		6 months	
42. Tennessee	Between 100 and 107 days after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.	Between 55 and 70 days from vacancy	30 days	
43. Texas	Between 36 and 50 days*			
44. Utah				
45. Vermont	3 months max.	Between 40 and 46 days before general	6 months	
46. Virginia	35 days min.	No primary		
47. Washington	90 days min. after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.	At least 30 days before general	6 months	
48. West Virginia	Between 30 and 75 days after writ of election is issued. The governor must issue the writ within 10 days of the vacancy.			
49. Wisconsin	Between 62 and 77 days*		Between 49 and 92 days	
50. Wyoming	40 days min.		6 months	

*These time periods do not begin until the governor issues the writ of election. For these states, the times between and the vacancies and the governors' announcements were not specified.

Mr. CHABOT. Mr. Baker.

STATEMENT OF M. MILLER BAKER, PARTNER, McDERMOTT, WILL & EMERY

Mr. BAKER. Mr. Chairman, Mr. Ranking Member and Members of the Committee, thank you very much for the invitation to be here today.

As a general matter, I support Congressman Baird's proposed amendment, and I applaud him for submitting it. I think this is a very important issue that needs——

Mr. CHABOT. Would you mind pulling that mike just a little closer there?

Mr. BAKER. Yes. I am sorry.

As a general matter, I support Congressman Baird's proposed amendment. As September the 11th so terribly demonstrated, we live in a very dangerous world, a world in which our enemies cannot necessarily be deterred by—in the way that they could in the past.

As things now stand, if some catastrophe were to suddenly eliminate most of the House's Members, legislative power would devolve on a handful of Members until the House could fully be reconstituted through special elections. Allowing State governors to make temporary appointments to fill these vacancies seems to me to be a very sensible solution to this problem, and one can perhaps fine-tune the exact mechanism by which this is done, but in general I think the principle is very sound.

If anything, this amendment is maybe too limited, in that it would only apply if a quarter of the seats in the House were vacant. In my view, temporary appointed representation in the House is better than no representation, especially in a time of crisis or emergency. If I were writing the amendment, I think I would change it to provide for such a power of appointment to fill any vacancies whenever they occur.

In the short run, pending the consideration, submission, ratification of a constitutional amendment, a process that could take several years, Congress could, and in my view should, enact a statute requiring States to hold special elections within a specified time period following a House vacancy. Such a solution would at least minimize the time during which there could be widespread vacancies in the House following some catastrophe.

In particular, article one, section 4, clause one of the Constitution empowers Congress to preempt State law with respect to the times, places and manner of holding elections of the House. And there is an existing statute, 2 USC section 8, that says in the event of a vacancy in the House, State law shall determine when there is a special election to fill the vacancy. All it would take is a simple amendment to 2 USC, section 8 to require States to hold a special election within a specified time frame, 90 days or 120 days, but I think there should be some minimum or maximum time period during which a State must hold a special election.

Again, I applaud Congressman Baird and this Subcommittee for taking up this issue, but, in my view, any constitutional amendment that provides for continuity of representation in the House should also address the even more urgent question of presidential succession when there are simultaneous vacancies in the Presidency and Vice Presidency. My prepared testimony addresses this subject more in depth. I will briefly summarize my views.

Under the Presidential Succession Act of 1947, found at 3 USC, section 19, the line of succession after the Vice President begins with the House Speaker, continues with the President pro tem of the Senate and goes down to the Cabinet. What most people don't realize—and I don't think most people in government realize—is that the Speaker and the President pro tem are given a preferred place and that the Speaker or President pro tem can displace a Cabinet officer serving as acting President.

What that means in practical terms is that if the Nation suffers a catastrophe in which the President, the Vice President, the

Speaker and the President pro tem and most of the Members of Congress are killed or incapacitated, a handful of surviving Members of Congress will not only inherit the full legislative powers of Congress, but they will also inherit the Presidency, because they would be able to elect a new Speaker or a new President pro tem, and that person could displace an acting Cabinet officer who had resigned his position to serve as acting President. In my view, this is a very dangerous state of affairs.

At a minimum, Congress should amend the 1947 Presidential Succession Act to eliminate the ability of a House Speaker or President pro tem to displace a Cabinet member who is serving as acting President.

Beyond that, in my view, Congress should amend the 1947 Succession Act to take the Speaker and the President pro tem completely out of the line of succession, for a whole variety of reasons. But, among others, placing these officers in the line of succession allows for the possibility that some catastrophe could overnight result in a change of political control in the White House, and I don't believe Osama bin Laden should be able to replace the Clinton Administration with a Gingrich administration or the Bush Administration with a Byrd administration. I think that is just unacceptable.

Third, I think we need to reconstitute the line of succession to include State governors, that is State governors chosen by the President. As my colleague here, Mr. Ornstein, just pointed out, that would allow a dispersal throughout the country so if there were some catastrophe in Washington you would have a Presidential successor who was outside of the Nation's Capitol.

So, finally, if the House is prepared to take up this constitutional amendment, I urge it to take up the—to broaden the scope of the amendment, to look at the issues of Presidential succession as well. There are many issues that need to be resolved, and that would have been the appropriate place to address them. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF M. MILLER BAKER

Mr. Chairman, Ranking Member, and Members of the Subcommittee:

Thank you for the invitation to testify here this afternoon on H.J. Res. 67 and related legal issues pertaining to continuity of government. I am honored to be here. The views expressed here are mine alone.

In response to the terrorist attack on America on September 11, 2001, Representative Brian Baird introduced H.J. Res. 67, a proposed constitutional amendment that would authorize state governors to appoint interim House members to fill vacancies whenever twenty-five percent of the seats in the House are vacant due to death or incapacity. The amendment would also require states to hold special elections to fill such vacancies within 90 days of the appointment of an interim member.

As a constitutional matter, it is beyond serious dispute that a constitutional amendment is necessary to authorize state governors (or anyone else) to make interim appointments to fill vacancies in the House of Representatives. Article I, Section 2, Clause 1 of the Constitution provides that members of the House shall be "chosen every second Year by the People of the several States," and that the Electors (voters) for House elections "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." In other words, the same voters that are eligible to elect state legislators are eligible to participate in House elections. Article I, Section 2, Clause 4 provides that when "vacancies happen" in the House from any state, the state governor "shall issue Writs of Election to fill

such Vacancies." Thus, a vacancy in the House may only be filled by an election in which the voters choose the new member.

A constitutional amendment, however, is not necessary to require the states to hold special elections to fill House vacancies as soon as practicable. Article I, Section 4, Clause 1 of the Constitution empowers Congress to preempt state law with respect to the "Times, Places, and Manner of holding Elections" for the House. Section 8 of Title 2 of the United States Code currently leaves it to state law to determine when an election must be held to fill a vacancy caused by the death, resignation, or incapacity of a House member. By a simple statutory amendment to 2 U.S.C. § 8, Congress could require states to hold special elections to fill House vacancies within a specified time period.

As a general matter, I support Congressman Baird's proposed amendment. As September 11 so terribly demonstrated, we live in a very dangerous world. As things now stand, if some catastrophe were to suddenly eliminate most of the House's members, legislative power would devolve on a handful of members until the House could be fully reconstituted through special elections. Allowing state governors to make temporary appointments to fill House vacancies seems to me to be a sensible solution to this problem.

Indeed, if anything, H.J. Res. 67 is arguably too limited, in that it would only apply if a quarter of the seats in the House were vacant. In my view, temporary appointed representation in Congress is better than *no* representation, especially in a time of crisis or national emergency. Thus, I would change H.R. Res. 67 to provide for a gubernatorial appointment power to temporarily fill House vacancies whenever they occur.

In the short run, pending the consideration, submission, and ratification of a constitutional amendment, a process that could take several years, Congress could, and in my view should, enact a statute requiring states to hold special elections within a specified time period following a House vacancy. Such a statutory solution would at least minimize the time during which there could be widespread vacancies in the House following some catastrophe.

Congressman Baird and this Subcommittee are to be applauded for taking up this important issue of congressional vacancies, but in my view any constitutional amendment that provides for continuity of representation in the House should also address the even more urgent question of presidential succession.

In the event of a vacancy in the Presidency, the 25th Amendment (ratified in 1967 in response to Lyndon Johnson's succession to the Presidency in 1963 following the assassination of President Kennedy) is clear: the Vice-President "shall" become President, and the new President "shall" appoint, subject to confirmation by a majority of both houses of Congress, a new Vice President. However, in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of these officers to exercise presidential duties, the nation's presidential succession mechanism is probably unconstitutional and is a sure formula for instability and partisan gamesmanship. Indeed, the current presidential succession mechanism is likely to produce instability, hesitation, and uncertainty at precisely the moment when the need for decisive executive authority, or as Alexander Hamilton put it in The Federalist No. 70, "energy in the executive," is most urgent.

Article II, Section 1, Clause 6 of the Constitution (the "Succession Clause") specifies that in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of those officers to act, Congress may by law specify what "Officer" shall "act as President . . . until the disability be removed, or a President shall be elected." Thus, unlike a Vice President who becomes President under the 25th Amendment (which constitutionalized the precedent set by Vice President John Tyler's assumption of the Presidency in 1841 following the death of President William Henry Harrison), a statutory successor under the Succession Clause may only "act" as President. If a statutory successor is serving as Acting President, Congress may—but is not required to—call a new presidential election.

Congress has exercised its power to designate statutory presidential successors three times in U.S. history, and on two of those occasions, partisan considerations were the overriding impetus for the result.[1] In 1792, during George Washington's first presidential term, the Federalist-controlled Second Congress designated two congressional officers as statutory presidential successors after the Vice President: first the President pro tempore of the Senate, and then the Speaker of the House. The 1792 Act provided that these officers were to "act" as President while retaining their congressional offices, pending a special presidential election, which the 1792 Act also provided for. Although Congressman James Madison voted against the

[1] For a detailed treatment of Congress's succession legislation in 1792, 1886, and 1947, *see* R. SILVA, PRESIDENTIAL SUCCESSION 112–31 (1951).

1792 Act and contended that it was unconstitutional because these congressional officers are not "Officers" within the meaning of the Succession Clause, partisan interests overrode constitutional principle. Alexander Hamilton, the leader of the Federalists and Secretary of the Treasury, directed the Federalist majority in Congress to defeat alternative legislation that would have placed his chief political rival, Secretary of State Thomas Jefferson, in the statutory line of succession in lieu of the President pro tempore and the Speaker.

During the impeachment and trial of President Andrew Johnson in 1868, when the office of Vice President was vacant, it was apparent that the 1792 Act's placement of the President pro tempore of the Senate and the Speaker of the House in the line of succession created serious problems, especially when the President and these congressional officers came from different parties. Such placement injected partisan tensions into what should be a smoothly-functioning succession mechanism, and it opened the door to a congressional cabal's seizure of the Presidency by elevating one of their own through impeachment and removal of the President in the event of a vacancy in the Vice Presidency.

In the 1880s, when the painful experience of the Johnson impeachment and trial was still a recent memory, two other episodes jolted Congress into enacting a new statutory line of succession. First, in 1881, following the death of President James Garfield by an assassin's bullet, the succession of Vice President Chester Arthur to the Presidency meant that there was no statutory successor to President Arthur because Congress was out of session and there would be neither a President pro tempore nor a Speaker until Congress reconvened. That prompted discussion and the introduction of legislation, but nothing came of it.

Then, in 1885, Democratic President Grover Cleveland's Vice President, John Hendricks, died in office, and as Congress was out of session, once again there were no statutory successors to act as President in the event that the President died or was otherwise unable to discharge his duties. Upon the reconvening of Congress, Republican Senator George F. Hoar of Massachusetts introduced legislation providing that after the Vice President, the line of succession would begin with the Secretary of State and would continue through the cabinet department heads in the order of the departments' creation. Senator Hoar's legislation took the Republican President pro tempore (along with the House Speaker) out of the line of succession and replaced with them with Cleveland's Democratic cabinet, so it was a rare act of principled statesmanship regarding a subject, presidential succession, where partisan considerations have usually carried the day.

Senator Hoar persuaded his Republican Senate colleagues to pass his legislation, notwithstanding their partisan interests, on the basis that history demonstrated that the Secretary of State was more likely to be fit for executive responsibilities than the chief congressional officers, and that it violated the separation of powers for a congressional officer to act as President. Additionally, Senator Hoar contended that placing the President's cabinet officers in the line of succession would not result in a change of partisan control of the Presidency, whereas the 1792 Act created an incentive for anyone seeking to effect a change in policy to assassinate the President when the Vice Presidency was vacant and the Senate controlled by the other party. The Democratic-controlled House passed this legislation, and Senator Hoar's bill was signed into law by President Cleveland as the Presidential Succession Act of 1886. The 1886 Act also provided that a statutory successor would immediately convene Congress, if it were not already in session, which could then decide whether to call a special presidential election.

The 1886 Act was the statutory regime in place in 1945 when President Franklin Roosevelt died and Vice President Harry Truman succeeded to the Presidency, leaving a vacancy in the office of Vice President.

President Truman believed on populist principle that if he were unable to complete Franklin Roosevelt's last term, an elected official rather than the unelected Secretary of State should act as President. Curiously, he also thought it unwise for a President to have the power to choose his own successor, although Franklin Roosevelt effectively had done just that by naming Truman as his running mate in 1944. Within a few months of taking office in 1945, Truman proposed legislation providing for the House Speaker and President pro tempore of the Senate (in that order) to again be placed in the statutory line of succession, this time ahead of the cabinet officers. This proposal, which also provided for the calling of a special presidential election, also went nowhere when Truman's party controlled both the Congress and the White House.

After the Republicans won control of Congress in the mid-term elections of 1946, however, Truman renewed his request, and the Republican Congress was happy to oblige him, over the forceful objection of some, such as Democratic Senator Carl Hatch of New Mexico, who reiterated arguments previously voiced by James Madi-

son in 1792 and Senator Hoar in 1886. While the Republican Congress was delighted to place its own officers in the line of succession after Truman, it was not prepared to provide for a special presidential election that might displace its own officer from the Acting Presidency. Thus, Truman's sincere but misplaced populism and Republican partisan opportunism combined to produce the Presidential Succession Act of 1947, a complicated statute found at Section 19 of Title 3 of the United States Code that, for better or worse, is still the applicable law today.[2]

Section 19(a)(1) of the 1947 Act provides that in the event that there is neither a President nor a Vice President, or in the event the incumbents of those offices are unable to discharge their duties, the Speaker of the House shall, upon his resignation as Speaker and as a Representative in Congress, "act as President." Section 19(a)(2) provides that in the event there is no House Speaker, or if the Speaker fails to qualify, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as senator, act as President. In the event of the removal of an incumbent President or Vice President's "inability" to discharge his duties, Section 19 terminates the (by then) former Speaker or (by then) former President pro tempore's tenure as Acting President.

The requirement that the Speaker and President pro tempore resign their seats in Congress before assuming presidential duties is practically demanded by the separation of powers, but it could cause either or both of these officers to hesitate or decline to assume presidential duties, especially if either the House or Senate were as closely divided as they are today. For example, had fate presented 98-year-old Senator Strom Thurmond with the opportunity to assume presidential duties while he was President pro tempore during the first half of 2001 (when the Senate was evenly divided prior to Senator Jeffords's switch of parties), he would have had to consider the fact that his resignation from the Senate would have resulted in a Democratic takeover of the Senate, because the Democratic Governor of South Carolina presumably would have appointed a Democratic successor to Thurmond's vacant Senate seat.

In the event that there is neither a House Speaker nor a President pro tempore of the Senate, or in the event that neither qualifies or is able to assume the position of Acting President, Section 19(d) specifies that the cabinet member who is highest on the following list shall act as President, provided that the cabinet member has been confirmed by the Senate prior to the vacancy in the President pro tempore's office or the failure of the President pro tempore to qualify as Acting President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, and Secretary of Veterans

Affairs.

The order of succession advances down this list in the event that a cabinet position is vacant or its incumbent is unable or unwilling to assume the status of Acting President. Section 19 provides reasons why a cabinet officer might decline to assume the Acting Presidency, especially if his or her tenure as Acting President might only be for a few hours or days.

Under Section 19, the taking of the presidential oath by any cabinet officer is deemed to constitute the officer's resignation from their cabinet office. In our era of protracted and bruising Senate confirmation ordeals, this resignation requirement might cause the statutory successor to hesitate before assuming presidential duties or to decline to do so altogether, especially if it appeared possible that the President or Vice President might recover the ability to discharge his duties after a temporary inability to do so.

Section 19 imposes another important constraint on the assumption of the presidential duties by cabinet members. If the Speaker and the President pro tempore do not assume the duties of the Presidency, either because they are dead, because they are "unable" to act, or because they decline to assume presidential duties (perhaps because of the resignation of their own congressional office that is required by Section 19), a cabinet officer who does accept presidential duties (and thereby resigns from his or her cabinet office) is subject thereafter to being displaced from the Acting Presidency by a Speaker or President pro tempore who changes his or her mind and decides to exercise presidential prerogatives, or recovers his or her ability

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[2] The best scholarly treatment of the complexities of the 1947 Act (and its interaction, or lack thereof, with the 25th Amendment) is by William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: The Emperor Has No Clones*, 75 GEO. L.J. 1389 (1987) and Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: If at First You Don't Succeed, Try, Try Again*, 20 HASTINGS CONST. L.Q. 105 (1992).

to discharge presidential duties after a period of "inability" (e.g., after a return from foreign travel). In other words, a cabinet successor serving as Acting President is subject to dismissal and replacement at will by either the Speaker or the President pro tempore.

Perhaps most unsettling of all is the possibility that a cabinet officer acting as President could be displaced from the exercise of presidential duties by a newly-chosen Speaker or President pro tempore, even if the selection of the new Speaker or President pro tempore was made post-attack by a handful of surviving representatives or senators who happened to be out of Washington when the enemy struck. Thus, on September 11, if the President, Vice President, Speaker, President pro tempore, and most members of Congress had been killed in attacks on the White House and the Capitol Building, and with Secretary of State Powell out of the country and possibly unable to immediately discharge presidential duties, Treasury Secretary Paul O'Neill might have become Acting President, at the cost of his cabinet office (assuming that he survived the attack on the White House, which is adjacent to his own office in the Treasury Department building). If only a dozen members of the House had survived such a catastrophe, they could have promptly selected any of their own as the new Speaker, who in turn could have promptly displaced O'Neill as Acting President. O'Neill, having resigned his cabinet office to assume the Acting Presidency, would then have had to return to the private sector rather than the Treasury Department.

The point that bears special emphasis is that if the nation suffers some catastrophe that results in the loss of the President, the Vice President, and most members of the House and Senate, the surviving members of Congress will inherit not only the full legislative powers of Congress, but also the Presidency itself, should a newly-chosen Speaker or President pro tempore chose to displace any surviving cabinet member that resigned his or her cabinet post to serve as Acting President.

Notwithstanding President Truman's good intentions, in my opinion the 1947 Act placing congressional officers in the line of succession (and giving them a preference in the line of succession by empowering them to displace cabinet successors at will) is probably unconstitutional and is certainly unwise policy.

The 1947 Act is probably unconstitutional because it appears that the Speaker of the House and the President pro tempore of the Senate are not "Officers" eligible to act as President within the meaning of the Succession Clause.[3] This is because in referring to an "Officer," the Succession Clause, taken in its context in Section 1 of Article II, probably refers to an "Officer of the United States," a term of art under the Constitution, rather than any officer, which would include legislative and state officers referred to in the Constitution (e.g., the reference to state militia officers found in Article I, Section 8). In the very next section of Article II, the President is empowered to "require the Opinion, in writing, of the principal *Officer* in each of the executive Departments" and to appoint, by and with the advice and consent of the Senate, "Officers of the United States." These are the "Officers" to whom the Succession Clause probably refers. This contextual reading is confirmed by Madison's notes from the Constitutional Convention, which reveal that the Convention's Committee of Style, which had no authority to make substantive changes, substituted "Officer" in the Succession Clause in place of "Officer of the United States," probably because the Committee considered the full phrase redundant.

The Constitution is emphatic that members of Congress are not "Officers of the United States." The Incompatibility Clause of Article I, Section 6, clause 2 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." In other words, members of Congress by constitutional definition cannot be "Officers of the United States." The Constitution further distinguishes between "Officers" and members of Congress in specifying qualifications for presidential electors: "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector" (Article II, Section 1, clause 2). Similarly, in requiring oaths to support

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[3] The argument to this effect by James Madison in 1792, Senator George Hoar in 1886, and Senator Carl Hatch in 1947 is further elaborated by SILVA, *supra* note 3, at 131–37, and by Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional*, 48 STAN. L. REV. 113 (1995). Professor John Manning, in response to the arguments advanced by the Amars (and Madison, Hoar, Hatch, and Silva before them), contends that the constitutional arguments against placement of congressional officers in the line of succession are not so strong as to overcome the presumption in favor of the constitutionality of acts of Congress. *See* John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995). Professor Calabresi concurs with the Amars' constitutional arguments, but concludes that the issue is a classic political question and hence non-justiciable by an Article III court. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

the Constitution, Article VI distinguishes between legislators and officers: "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

The understanding that "Officers of the United States" are distinct from members of Congress, including congressional officers, is supported by the Constitution's requirement that the President alone, subject to the advice and consent of the Senate, appoint (Article II, Section 2, clause 2) and commission (Article II, Section 3) "Officers of the United States" and that "all civil Officers of the United States" be subject to impeachment (Article II, Section 4). The President neither appoints nor commissions the Speaker and the President pro tempore, and neither the Speaker nor the President pro tempore is subject to impeachment.

There are some important practical consequences that follow from the principle that members of Congress are not "Officers of the United States." Under Article I, Section 3, Clause 7, an "Officer" that has been impeached by the House and removed from office by the Senate is disqualified "to hold and enjoy any Office of honor, Trust, or Profit under the United States." Such a person, however, is not disqualified from serving in Congress, because a member of Congress is not an "Officer" under the Constitution, and persons that have been impeached by the House and removed from federal office by the Senate have thereafter been elected to Congress.

The contextual argument that members of Congress are not "Officers" within the meaning of the Succession Clause is supported by an appreciation of the Constitution's structure. Under the structure of the Constitution, it is almost inconceivable that Congress may place its own officers in the line of presidential succession. It strains credulity to think that the Framers, who were especially concerned about the inherent legislative tendency to aggrandize power at the expense of the Executive Branch, would have permitted Congress to place its own officers in the line of succession, when they went out of their way to deny Congress any appointment power as to Executive and Judicial officials, not only as to Officers, but also as to lowly "inferior Officers" who do not even require Senate confirmation. It is hardly likely that the same Constitution that denies Congress the power to appoint local postmasters and federal court clerks provides Congress with the power to appoint an "Officer" who might be called upon to exercise presidential duties. Indeed, the Vice Presidency was created during the Constitutional Convention precisely because it became apparent that making the President of the Senate the President's successor (which early drafts of the Constitution provided for) was incompatible with the separation of powers.

Finally, the Succession Clause appears to contemplate that the "Officer" shall keep his position and simultaneously "act" as President, a situation that would destroy the separation of powers if a member of Congress were to simultaneously act as President. (A cabinet officer could, however, simultaneously exercise his or her cabinet and presidential duties without violence to the separation of powers. Indeed, the 1947 Act's requirement that a cabinet successor resign his or her cabinet office is yet another probably unconstitutional feature of that Act.) In any event, even if the Speaker and President pro tempore were otherwise eligible to act as President under the Succession Clause, it would destroy the separation of powers to allow them, as Section 19 does, to displace at will a cabinet officer serving as Acting President, because under that arrangement the Acting President would serve at the sufferance of the Speaker and the President pro tempore.

Quite apart from these constitutional objections, there are compelling policy reasons against placing the Speaker and the President pro tempore in the line of presidential succession. First, it allows for the possibility that a terrorist attack or some other catastrophe could undo the results of the preceding presidential election by suddenly transferring the Presidency from one party to another. Osama bin Laden should not be permitted to replace the Clinton Administration with the Gingrich Administration, or the Bush Administration with the Byrd Administration. Presidential succession is traumatic enough when the successor is from the President's own party, as in the case of the assassination of John Kennedy in 1963 or the resignation of Richard Nixon in 1974. The national trauma would be even greater if control of the Executive Branch also changed as a result of assassination or foreign attack. Indeed, the very possibility that a successful attack could result in a change of control of the Presidency (and hence a change in foreign policy) might in certain circumstances even induce foreign enemies to contemplate such an attack, especially if the attack could be passed off as the work of terrorists or domestic madmen.

That the placement of congressional officers in the succession mechanism might be manipulated for partisan purposes was evident during the impeachment of An-

drew Johnson. Congress sought to eliminate this possibility with the 1886 Act, but Harry Truman's 1947 Act revived it by reinstating the Speaker and President pro tempore in the line of succession. More recently, after Vice President Spiro Agnew's resignation in 1973, some Democratic members of Congress sought to convince their colleagues to block the confirmation of Gerald Ford to the Vice Presidency, to which Ford had been nominated by President Nixon in the first use of the 25th Amendment, in the expectation that Nixon would ultimately be forced from office, and that the Presidency would then fall to the Democratic Speaker, Carl Albert, if the Vice Presidency were kept vacant. Fortunately, cooler heads prevailed, and the Democratic-controlled Congress confirmed Ford, but it illustrates the mischief possible under Section 19 in the event of a vacancy in the Vice Presidency.

Second, the placement of congressional officers in the line of succession injects partisan tensions into the succession mechanism in other, less obvious ways. For example, on March 30, 1981, while President Reagan was undergoing surgery after suffering a gunshot wound in an assassination attempt, and Vice President George H.W. Bush was aboard Air Force Two returning to Washington from Texas, most of the cabinet convened in the White House Situation Room. From all accounts that have been written of that day, it is clear (and frightening) that Vice President Bush's ability to communicate meaningfully with the White House Situation Room while aboard Air Force Two was marginal at best. Thus, on his own authority in the military chain of command, and to the consternation of Secretary of State Alexander Haig, Secretary of Defense Caspar Weinberger (prudently) ordered a heightened alert status for U.S. strategic forces, because it was unclear whether the attempt on President Reagan's life had any connection with the fact that Soviet ballistic missile submarines off the U.S. East Coast—which, because of minimal warning times, would have been a key instrument in any Soviet first strike—were operating unusually close to U.S. shores that day.

But most remarkable of all about the events of March 30, 1981, is that it does not appear to have even occurred to anyone in the White House Situation Room to invite the Democratic Speaker of the House, Thomas "Tip" O'Neill, to join the cabinet in the event that it became necessary to issue presidential orders and Vice President Bush could not effectively communicate with the cabinet (the classic instance of "inability" within the meaning of the Succession Clause and Section 19). Apparently it was inconceivable to the assembled cabinet members that the leader of the Democratic opposition should be prepared for the possibility of temporarily assuming presidential duties, even if the Vice President could not be reached and the President was fighting for his life in emergency surgery. On the other hand, it is far from clear that Speaker O'Neill would have been willing to resign from the Speakership and the House so that he might serve as Acting President during the three hours that Vice President Bush was in transit back to Washington.

Third, as Senator Hoar observed in 1886, history shows that senior cabinet officers such as the Secretary of State and the Secretary of Defense are generally more likely to be better suited to the exercise of presidential duties than legislative officers. The President pro tempore, traditionally the senior member of the party in control of the Senate, may be particularly ill-suited to the exercise of presidential duties due to reasons of health and age, especially in a crisis like September 11 where an Acting President might be called upon to act decisively and even ruthlessly to protect national security.

The Speaker and President pro tempore, however, are not the only statutory successors designated by Section 19 who might lack presidential attributes. In any President's cabinet, for every Colin Powell and Donald Rumsfeld there are others whose presidential qualities are not so obvious. In selecting their cabinets, Presidents simply do not exercise the same care that they might exercise in selecting a Vice President, even though under Section 19 any cabinet officer might find themselves thrust into the role of Acting President at a moment of supreme crisis comparable to December 7, 1941, and November 22, 1963, rolled into one, which is what September 11, 2001, easily could have been had the President been in Washington and the terrorists been just a bit luckier.

Whether or not they possess presidential attributes, the total number of statutory presidential successors is, at most, sixteen—the Speaker of the House, the President pro tempore of the Senate, and the fourteen members of the cabinet. At any given moment, this number might be reduced by vacancies in these offices, the "inability" of the officers to act, or the ineligibility of some of these officers to assume presidential duties. An example of cabinet officers who are unable to act are those absent from Washington and unable to effectively communicate with Washington, as when several members of John Kennedy's cabinet were on board a jet over the Pacific en route to Japan on November 22, 1963. Cabinets not infrequently contain naturalized citizens who are ineligible to discharge presidential duties (e.g., Henry Kissinger in

the Nixon and Ford Administrations, Madeleine Albright in the Clinton Administration, and Elaine Chao and Mel Martinez in the current Administration), which may further reduce the pool of potential statutory successors.

Finally, all of the statutory successors work in Washington, D.C., which means, as Norman J. Ornstein has observed, that a nuclear or biological attack on the nation's capital could eliminate the entire line of succession (and the rest of the federal government) in one fell swoop.[4] In that extreme situation, the Presidency would fall (after some period of vacancy) by default into the hands of the surviving representative who convinced his or her surviving colleagues to select him or her as Speaker, or the surviving senator who convinced his or her surviving colleagues to select him or her as President pro tempore.

September 11 also illustrates another weak link in the presidential succession mechanism. Under Section 19, the first cabinet successor to assume presidential duties may not thereafter be displaced by another, prior-entitled cabinet successor who was temporarily unable to do so. Thus, on September 11, when Colin Powell was out of the country, if the President, Vice President, Speaker, and President pro tempore had been killed or were missing in attacks on the White House and the Capitol Building, Treasury Secretary O'Neill would have had to make an immediate decision about whether Colin Powell was unable to discharge presidential duties because of his absence from the country. Under Section 19, had O'Neill assumed presidential duties, Powell would not have been able to displace O'Neill upon his return to Washington, which might have resulted in claims that O'Neill had wrongfully usurped the Presidency and in litigation (the last thing the nation would want or need at such a moment) over whether Powell in fact had been unable to discharge presidential duties at the time of O'Neill's assumption of the Acting Presidency. The very fact that O'Neill might be exposed to charges of usurpation might cause him to hesitate before acting, leaving the world (and other foreign enemies in particular) to wonder who was running the government while the Secretary of State was abroad and the President, Vice President, Speaker, and President pro tempore dead or missing in the burning rubble of the White House and Capitol Building.

A better solution would be to permit a lower-ranking cabinet officer such as Treasury Secretary O'Neill to temporarily assume presidential duties, without loss of his or her cabinet office, until a higher-ranking cabinet officer is able to do so. Thus, in the September 11 scenario discussed above, Secretary O'Neill could have announced to the nation and the world that he had temporarily assumed presidential duties pending Secretary of State Colin Powell's return to Washington. Thus, Secretary O'Neill could have temporarily acted as President to protect the nation's interests, without resigning his cabinet office, and without offense to higher-ranking Secretary of State Colin Powell, who would have assumed the Acting Presidency upon his return to the U.S.

September 11 aptly demonstrates Winston Churchill's dictum that sometimes in war "the imagination is baffled by the facts." Sooner or later, and perhaps at the hour of maximum national peril, the nation's poorly-designed presidential succession mechanism may plunge the nation into unprecedented political turmoil or deliver the Presidency into the hands of some junior cabinet officer or member of Congress ill-equipped for such a role. The Bush Administration, apparently aware of the potential magnitude of the disaster that might result from simultaneous vacancies in the Presidency and Vice Presidency, has taken extraordinary steps to limit the occasions during which President Bush and Vice President Cheney might be found together, at the White House or elsewhere. Indeed, it appears that the Vice President has been largely kept away from Washington at an undisclosed "secure location" since September 11, at least when the President has been in town.

Relocating the Vice President's office to a bunker in the Blue Ridge Mountains is not a permanent or satisfactory solution to the succession problem, especially when the Vice President has important duties of his own, including presiding over a closely-divided Senate where he might be called upon to cast the deciding vote. A better near-term solution is to amend Section 19 to reconstitute the line of succession with officers from those departments with the most important Executive Branch functions and with state governors selected by the President. The Speaker, President pro tempore, and the less important cabinet officers should be removed from the line of presidential succession.

The reconstituted line of succession after the Vice President should begin with the Secretary of State, and continue on with the Secretary of Defense, the Secretary of the Treasury, and the Attorney General (in that order). These officers should be permitted to exercise presidential duties without resigning their positions, and those

[4] See Norman J. Ornstein, *Worst Case Scenarios Demand the House's Immediate Attention*, ROLL CALL, Nov. 8, 2001, found at http://www.rollcall.com.

officers higher on the list should be able to displace more junior successors only if they had been under a temporary disability at the time the more junior officer accepted presidential duties.

After these cabinet successors, Section 19 should designate as statutory successors those state governors that the President chooses to "federalize" in their capacity as commanders-in-chief of their states' National Guard.[5] Although the issue is not free from doubt, federalizing a governor in his or her capacity as commander-in-chief of a state's military forces would arguably have the effect of making such a governor an "Officer" of the United States eligible to act as President. (At least it would not be any more unconstitutional than the 1947 Act's placement of congressional officers in the line of succession.) Placing designated "federalized" governors in the line of succession would ensure continuity of the Presidency in the event that all of the cabinet successors were eliminated by an attack on Washington, D.C., with a weapon of mass destruction.

In the long run, the solution to the problem of the concentration of presidential successors in Washington is a constitutional amendment that allows the President to nominate, subject to Senate confirmation, statutory presidential successors (in addition to the cabinet) who are not "Officers" of the United States, but nevertheless are eminently qualified, to act as President in the extreme situation that the nation would face following the destruction of Washington, D.C., and the elimination of the President, the Vice President, and the statutory cabinet successors. For example, President Bush might nominate former President George H.W. Bush and former Vice President Dan Quayle, both of whom no longer live in Washington, to serve in the line of succession. Similarly, a future President Daschle might nominate former Vice Presidents Al Gore and Walter Mondale to serve in the statutory line of succession.

Such a constitutional amendment, by eliminating the requirement that a statutory successor be an "Officer" of the United States, would also eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the Acting Presidency). Such a constitutional amendment could eliminate other uncertainties in the succession mechanism, such as whether the confirmation of a Vice President nominated under the 25th Amendment operates to displace a statutory Acting President who made the nomination.

Thus, in considering H.J. Res. 67, I urge the Subcommittee to consider broadening the proposed constitutional amendment to deal with presidential succession. After the near-miss of September 11, there is no time to be lost in ensuring that the presidential succession mechanism is stable, predictable, and seamless, even (and especially) during moments of supreme crisis such as a foreign attack upon the United States.

Mr. CHABOT. Finally, we will hear from Professor Tiefer.

STATEMENT OF CHARLES TIEFER, PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Mr. TIEFER. Thank you, Mr. Chairman and Members of the Subcommittee.

As Solicitor and Deputy General Counsel of the House of Representatives for 11 years from 1984 to 1995 and as the author of a thousand-page treatise on Congressional procedure, I had a lot of experience writing and planning and even litigating about how to handle special problems in the House.

I commend the Subcommittee. I commend Mr. Baird for putting this proposal forward. I commend the Subcommittee for considering it.

The experience in American history is, although you can't fully plan in advance for emergencies, every bit of preparation, every bit of prethinking, every bit of preplanning looking in retrospect to have been a blessed thing.

I want to say—briefly to describe how I understand what would happen in an emergency, namely—and our precedents in this re-

[5] Ornstein, *supra* note 6, suggests placing state governors in the line of succession.

gard principally flows from what happened in the very first days of the Civil War when the secession of the South depleted the House of Representatives in a big way. That is, it was at that time that the principle was established which is still reflected in the House Manual, which is that a quorum of the House is decided by the number of Members chosen, sworn and living who are still Members.

I have said and I maintain that, under that precedent, if there are only three surviving Congressman, if everyone else is in town but there are three who are out of town on a certain day when there is an emergency, if those three then gather, two of them are a quorum under the precedence of the House and under the quorum clause of the Constitution.

I further, from the same Civil War precedence, remind that—and Mr. Relyea's discussion of emergencies is relevant here—is that the principle that got us through the very first days of the Civil War was that actions can be taken on presumptive authority during an immediate period. President Lincoln's calling for volunteers, his declaring of a naval blockade and so forth, and once a functioning Congress convenes, which was a number of months after the start of the Civil War, the Congress fully functioning, ratifies that which has taken place previously. It is different from a coup. It is action taken—that has to be taken with a good expectation that it will be ratified once the Congress is up and going.

Now, I am not describing—obviously, I am not arguing that this is a good situation or even the best situation. It is in no way an optimum situation. But it is worth saying what I think would happen in an emergency. I don't wish to, like, heavily criticize H.J. Res. 67. Far from it. I am delighted a proposal was put forth. And I might say Mr. Ornstein invited me to join the working group he has described. I would have. I commend their work. It was a matter of my own scheduling that I couldn't attend, but his efforts are commendable.

I have noted the problems are fairly obvious. Everyone believes the fewer Constitution amendments, the better. In particular, constitutional amendments are rigid once they are launched, they can't be fixed, and an emergency is the toughest thing to handle by constitutional amendment, because you don't know beforehand what shape it is going to take. In the Civil War, they had to improvise greatly in those first couple of months to make a legal go of it.

In addition, there is the problem with the clashing of the theme that this is the people's House and that nobody gets here except by appointment. I realize there would be more urgent concerns in an emergency.

I have made my own proposal. It is explained in some length in my testimony, and I would just—I will put it very quickly.

The source of flexibility in the history of the Congress procedurally is the existence of the Committee of the Whole. There has been a Committee of the Whole in Anglo-American parliamentary procedure for 450 years. It is always where strange and amazing things are done.

I would particularly remind that in 1993, 1994 we gave the vote—the House gave the vote to delegates from Puerto Rico and

the other modern-day territories in the Committee of the Whole. I myself did the defense of the court case about whether that was constitutional. And I won unanimously both in district court and the court of appeals, so I am particularly familiar with the argument that you can have people who aren't elected representatives voting in the Committee of the Whole.

To me, if it is necessary, if you want to do something in advance that is sort of the minimalist and most flexible proposal for how to deal with a 3-month period until you can have special elections, what you do is you ideally, by a rule adopted now—although you could take action after the emergency. But ideally, by some planning in advance, you anticipate that there would be governors appointing, quote, emergency delegates, unquote, emergency delegates being the functional equivalent during that period of what territorial delegates are now. That is, they are not representatives, but they are given a vote in the Committee of the Whole.

During the 3-month period, they would therefore be able to do sort of 90 percent of the work of the House, which is processing legislation in the Committee of the Whole. At the same time you would have a stable and constitutionally clear structure, in that the surviving representatives would be the ones who, as the House, would keep the structure in place. You wouldn't have a fluctuating situation. You would have one Speaker and one majority party and one minority party, and they wouldn't go back and forth as people arrive who are appointed by governors.

Then at the end of the 3 months, the emergency delegates would be thanked and sent back, and elected people would take their place. That is my reaction.

But my main view is I think the fact that there are diverse proposals for what to do in this situation is a strength rather than a weakness. I hope that today is not the end but the beginning of the discourse on it. I hope that the initiatives that have been launched will go forward and we will discuss this further and I hope something will be done about this. Thank you.

Mr. CHABOT. Thank you very much, Professor.

[The prepared statement of Mr. Tiefer follows:]

PREPARED STATEMENT OF CHARLES TIEFER

I thank the Subcommittee for the opportunity to testify about H.J.Res. 67. The House and the public learned a lesson last September 11th—that we were much more vulnerable to attack than we had realized. I commend the Subcommittee for considering H.J.Res. 67, because the Subcommittee shows wisdom, in light of that lesson, in taking time to evaluate the ways we would respond to an emergency striking the membership of the House. As Solicitor and Deputy General Counsel of the House in 1984–95, and as the author of a thousand-page treatise on *Congressional Practice and Procedure* (Greenwood Press 1989), I have both experience, and an immersion in the precedents and history, on the subject generally of how the House has handled and can handle special problems.

1. *The Quorum of the Reduced Body.* The particular concern after September 11th, reflected in H.J. Res. 67, is how the national government could function, in an emergency that reduced the House's membership by more than a quarter through death or incapacitation. My own procedural guide is the House precedents, principally from the onset of the Civil War, recorded in the *Constitution, Jefferson's Manual, and Rules of the House of Representatives ("House Manual").* These are summarized, in section 54 following the Quorum Clause of the Constitution, that a quorum consists of "a majority of those Members chosen, sworn, and living" whose membership had not been terminated. Thus, for example, even though the Confederate secession

in 1861 depleted the House's membership, a quorum consisted of a majority of the remainder.

My own view is that if an emergency—say, a terrorist attack on the chamber, or a use of a chemical or biological weapon against the Membership—radically depleted the House's membership, a quorum would consist of the living remainder. I have said, and I maintain, that if even three Congressmen survive—say, from being out of town at the time of an attack—then two of them would be a quorum for legislative action.

2. *Action Subject to Later Ratification.* I also believe that in the event of a grave emergency, the legal way to describe interim governance of the country would be on the basis of temporary presumptive authority subject afterwards to legislative ratification. Again, the Civil War furnishes an example. President Lincoln took a number of steps, from calling for volunteers to establishing a blockade, before Congress came into session, and Congress ratified these when it did meet. The legal concept of public action, in situations which warrant proceeding without contemporaneous legal authority, subject to ratification afterwards, is a concept I have discussed. Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 San Diego L. Rev. 1, 20 (1999). Putting these two concepts together, after an emergency that depleted the House, I think the surviving members would meet and constitute a quorum able to legislate under the Constitution, but I also think that Executive—or Congressional—actions, such as expenditures of funds beyond appropriated levels, taken during the period before the House resumed something like ordinary functioning, would be taken with the expectation of doubts about authority or legitimacy being resolved by ratification later, as in 1861.

3. *Problems with H.J. Res. 67.* I am glad that Representative Baird introduced this proposal, and that this Subcommittee is holding a hearing on it. Moreover, I understand that Norman Ornstein, for whom I have high regard, has been working on this issue, and I am glad about that too. September 11th should inspire exactly such an effort. I make some observations about problems, not in the spirit of criticism, but simply to provide my thoughts when looking at a concrete proposal on the table.

(A) In general, the fewer constitutional amendments, the better. The less we tinker with the Constitution, the stronger it remains as a barrier protecting vulnerable liberties and institutional structures from legislative moods. The more this Subcommittee bottles up proposed amendments, the better. Moreover, on the particular subject of amendments to deal with emergencies, the view of observers in retrospect about Amendment XXV, dealing with Presidential disability, is that it is overly detailed and cumbersome, a problem hard to avoid in planning for the hard-to-imagine. If there are steps short of a constitutional amendment to address emergencies, we would all favor them.

(B) Constitutional experts from outside the House do not understand the point I would now make: there is a subtle but strong theme in the Constitution and in House history underlying the restriction that House vacancies are not filled by appointment, only by election. That theme is that this is the people's House, and no one can be a Representative in it unless chosen by the people. By contrast, the Senate, which the Framers initially established as not popularly elected (until popular election in the twentieth century) and which is (of course) not apportioned on the basis of population, does not have that theme in the same way; that is why gubernatorial appointments continue to be tolerable to fill Senate vacancies. I do not think H.J. Res. 67 would do large damage to that theme, but, it would be in tension with it.

4. *Doubts About Alternative Mechanisms to Choose Representatives.* At one point, I was told of a proposal that the Congress, under its authority to establish the "time, place, and manner" of elections, could provide by statute that, in the event of an emergency, governors (or someone else) could constitute the electorate for vacancy filling. I have strong doubts about this. Traditionally, Congress's "time, place, and manner" authority is considered highly limited. That is why national changes in the suffrage, such as the constitutional amendments about race, gender, and age, were not done by "time, place, and manner" authority. To purport to let Congress, by statute, adopt such an expansive view of its authority, it strikes me, would transgress important constitutional themes, by an assertion of large Congressional authority to enact on a subject where hitherto there has been careful limitation.

5. *My Own Proposal: Admitting Emergency Appointees to "Committee of the Whole"*: I will put forth my own proposal. To me, the classic place of flexibility to handle difficult problems in House procedure is in the "Committee of the Whole," the device by which legislation is considered and amended by a body that is parliamentarily distinct from the full House. In the House, we know this flexibility by the classic rule since 1890 that a mere 100 members (not the majority of a full

House of 218) is a quorum of the Committee of the Whole. That rule is still, of course, in effect, and, after an emergency that depleted the House, it is entirely likely that one response would be to increase the role of proceedings in the Committee of the Whole, where a reduced membership is natural and indeed was the norm before recorded roll calls started in the early 1970s. There are several good things about the flexibility of the Committee of the Whole: we have literally centuries of experience with it going back to medieval England, so it is not a worrisome innovation; it is an integral part of the special spirit of the chamber, which distinguishes the flexibility of the Committee of the Whole from the rigidity of the full House; and, the procedures for Committee of the Whole are governed wholly by the House itself, pursuant to its rule-making authority, rather than needing the Senate, the President, and (for constitutional amendments) the states.

If there is a desire to make provision for interim appointees by Governors to play a role until elections can fill House vacancies, I would suggest the House make provision to give such "Emergency Delegates" a role in the Committee of the Whole. Perhaps they might be allowed to vote in Committee of the Whole on proposed legislation, which would not, however, be deemed to have passed the House except when (and by reason of being) approved by the quorum of surviving Representatives, who, alone, would vote on final passage of legislation—until vacancies could be filled by election.

The immediate objection will be raised that no one but Representatives can vote in Committee of the Whole. But, we recall that the House provided in 1993–94 for territorial Delegates to vote in Committee of the Whole. What territorial Delegates could do, "Emergency Delegates" could do. The Delegate vote was controversial, and I do not want to revisit the controversy (I will say a little more below), except to say that even those who opposed that rule, might well find an arrangement for an emergency along such lines less objectionable than either a constitutional amendment or a statute to make gubernatorial appointees into full-fledged Representatives. Why?

(A) First, there would be no need for a rigid, detailed-in-advance, high-visibility structure like a constitutional amendment or even a statute. The House might even forego a rule in advance of the emergency; it would suffice, in time of emergency, then to adopt a rule inviting the governors to send "Emergency Delegates," just as the two chambers created, during the Civil War, a Joint Committee that operated powerfully without having been provided for in advance of the war. Naturally it would make sense to engage in any degree of planning or preparing in advance of an emergency to the extent practical, much as the military makes plans for how to respond to emergencies without having a rigid prescription for dealing with the unknown. The special benefit of proceeding via a House Rule would be that the response, whether presaged by a rule provision in advance or not, could be adapted readily to the particular form the emergency took.

(B) Second, a rule for "Emergency Delegates" could be adapted to suit the nature of post-emergency politics much better than a constitutional amendment or a statute. For example, suppose the chamber had Party #1 as a majority before the emergency, and the process of making appointments occurs over time and causes a stream of appointees to trickle in that causes the chamber's overall composition to fluctuate back and forth from Party #1 being in the majority to Party #2 being in the majority, then Party #1, and so on as any number of appointees arrive. The result (if the parties are functioning at all) would be confusion in the leadership and structure of the chamber. That same problem might occur in the Senate as its appointees trickle in, but at least there is less fluctuation as the filling of a chamber occurs toward a total of 100 than during the larger process of filling toward a total of 435; moreover, the institutional organizing role of party division is less in the Senate, where historically the "majority and minority leadership" often function together as a partnership, than in the House. If a House rule provides for "Emergency Delegates," it could be adapted to provide, one way or another, that the process of admitting these would be managed to keep some kind of steady state and minimize the distraction of the changing composition during a gradual filling. For example, it might simply be that admission of arriving appointees would occur by loose pairing to keep matters steady—something a lot easier to arrange if the whole process is part of House procedure, than if there is a constitutional amendment conferring status upon appointees.

None of us can anticipate the politics in the aftermath of an emergency. Presumably, as immediately after September 11th, and as immediately after Pearl Harbor, there would be in the immediate aftermath such an intense national reaction as to make politics irrelevant. But politics resumes after such periods: there was tumultuous politics during the Civil War; we have returned in some measure from September 11th to ordinary politics by January and February of 2002; and, after Pearl

Harbor in December of 1941, there was certainly a return in some measure to ordinary politics in time for the November 1942 election. We cannot anticipate whether the emergency will occur at the beginning, the middle, or the end of a two-year House cycle. We cannot anticipate whether the emergency will be one that sets back the course of holding elections for vacancies—for example, an epidemic that not only strikes Washington but affects more of the country. There is very little that we can anticipate. It will be enough of an experiment to have a large number of appointed Senators.

Not being able to anticipate the politics, it is better that the problem be handled flexibly, under an adaptable House Rule, than inflexibly, under a constitutional amendment. To take an unlikely but illustrative example, suppose the party of most of the governors is unpopular after the emergency, the way "Copperhead" Democrats were unpopular in parts of the nation in 1861, and this leads to their appointees to the House being unpopular, too. Then it would be better to let the role of those appointees find its natural level, than by constitutional amendment or statute to try to fix it in advance.

(C) Legally and constitutionally, having emergency appointees only serve in the "Committee of the Whole" keeps a consistent structure in place. The principle survives that no one becomes a Representative except by popular election, and, that laws still pass only by vote of Representatives. I would hope that the mixture of Representatives and Emergency Delegates would work together without unnecessary distinctions much as, in a classic wartime emergency like World War II, the "regular" (pre-war) military and the new recruits did. But I would retain the legal primacy in the hands of the Representatives, rather than the appointees. Pre-emergency Representatives and passage by them of laws are known and established things, legally; post-emergency appointees are simply neither known nor established.

(D) I have several responses on the precise parliamentary point of those who might find the arrangement discussed here better than the alternatives but remain strongly skeptical that Emergency Delegates could sit in Committee of the Whole. As Deputy General Counsel of the House of Representatives, I had the honor of successfully defending the 1993–94 rule, regarding territorial Delegates voting in Committee of the Whole, by briefing and argument in district court and the court of appeals. I won in each—unanimously. *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994). That opinion itself reflects the degree of flexibility the House has. Furthermore, I recommend the briefs filed by the House in that case, which develop the theory and precedents on the subject more fully than the opinion. In a few words, those briefs describe how the various provisions of Article I of the Constitution were devised by the Framers with the intention of giving the House great flexibility in what it did with the Committee of the Whole, and how the House has historically made good use of that flexibility. It is a useful source of authority to tap for emergencies.

Mr. CHABOT. I will begin the questioning with the first question to you, Professor, if that would be all right.

Could you describe the advantages of addressing the issue of House functioning during an emergency through changes to internal House rules rather than through a constitutional amendment?

Mr. TIEFER. I see them as three advantages.

One is simply it is extremely difficult to get a constitutional amendment passed at all. So even if we had one that landed in front of us and that every person agreed that it was the cat's meow, its chances of reaching the end of the House, the Senate and the States and finally taking its place in the Constitution would be real small. In contrast, the House rule, changes are made. They are made fairly frequently. If you have a good idea, it gets done. So, number one, it can be implemented.

Number two, it is vastly more flexible. If as we go along we change our minds, either before an emergency in thinking about what to do or after an emergency, then it simply takes a vote of the House to adopt a House rule. You don't have to go through the whole process. So that I know that we are talking about wildly different scenarios depending on whether the emergency is a physical

destructive event or an epidemic. You can adopt a rule, depending on what kind of emergency you have, not—you can't adopt a constitutional amendment.

The third and last thing is you don't change the Constitution, and so you keep continuity. So if the principle that is in the Constitution that this is the people's House and no one gets here except by election, then if you are doing something with House rules, you don't change the basic themes of the Constitution.

Mr. CHABOT. Thank you.

Mr. Ornstein, let me go to you next, if I can.

What are your views on Professor Tiefer's proposal to use the Committee of the Whole to deal with the emergency situations, and do you believe that that would be more flexible? You know, why would you be opposed to that, if you are? And couldn't the House simply amend its rules to define to what extent the incapacitation of Members affects the quorum requirement?

Mr. ORNSTEIN. I am not opposed to using the Committee of the Whole. I don't think it is an answer to the problem.

First, it is not an answer to the problem of having a very, very substantial number of Members incapacitated and unable to meet the quorum requirement. You could have a quorum if there are only three Members living, but what if you have got 200 living and they can't make it to the Congress itself? So you have got to grapple with the issue of the quorum itself.

The legitimacy—as a stop-gap measure in the short run, just to be sure that we could actually have a sizable number of people around and you could replenish and maybe you could have an implicit understanding that actions taken in the Committee of the Whole would be then governed if you moved back to the House as a whole if you had a quorum and even if it were three Members, you know, that is fine, but I don't believe that it answers the larger question of having a robust House, representative of the country and the population as a whole, acting at times when they may have to do a declaration of war, may have to come up with massive appropriations of public monies to deal with emergency relief or additional defense or do other dramatic things. So it is only a first step.

Mr. CHABOT. Thank you.

Mr. Relyea, what sorts of circumstances have Presidents understood to trigger—in Lincoln's words—their right to proclaim martial law?

Mr. RELYEA. Presidents usually come to the office with some notion of what the office allows them to do. If you are a Teddy Roosevelt, you had a stewardship theory that you could do almost anything unless law, the Constitution, explicitly prohibited it. President Taft had a little more limited view. He thought you could only do what the Constitution and the statutes explicitly said you could do. And in between there is all kinds of different views.

I think the interesting point here is the one that Mr. Tiefer makes and I think we are all aware of, that sometimes, quote, unquote, out of necessity, a President will take an action in the name of an emergency preserving the country, and it has to be a balanced one as to whether or not Congress—at least Congress and perhaps also the courts—will eventually sustain him in that. Is it

a reasonable action? And if it is a question legally, can it be then post factum ratified by the Congress?

So in the end we have seen Presidents do various kinds of things. Lincoln went way out on a limb. He said, in effect, I trust I have not done anything that Congress can't make acceptable, which they did. Much later on, we had a President who decided he was going to seize the steel mills, and the Congress said, no, you didn't meet the right conditions. There is no declaration of war.

Mr. NADLER. The Supreme Court, not Congress who said that?

Mr. RELYEA. Supreme Court, yes, sir. So the checks are there, and it is ultimately a consensus or a sense of what is right and wrong, legally and morally.

Mr. CHABOT. Thank you very much.

My time is expired. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you.

Professor Ornstein, it is not unusual for voters to elect representatives and governors of different parties, obviously. Under the proposed amendment, a governor of one party could appoint a House Member of a party affiliation different from the late incumbent. There has been some concern that the death of a senator with a one-vote margin—recently, that is, there has been some concern recently that the death of a senator with a one-vote margin in the Senate could alter control of the Senate, but at least both governors and senators—governors who would appoint a new senator are Statewide officials and answerable to the same constituency. House Members represent small parts of the State.

It would, for example, be very peculiar for New York's Republican governor to appoint a Republican to represent my very Democratic district. Do you think this concern needs to be addressed in the amendment?

Mr. ORNSTEIN. Unless his name were Bloomberg, perhaps, but that is another matter.

Mr. NADLER. A little peculiar, yes.

Mr. ORNSTEIN. But that is another matter.

I am sensitive to that, Mr. Nadler, very sensitive; and indeed Representative Baird and I had some discussions about this.

Party, of course, is not mentioned in the Constitution anywhere; and, you know, you have a question to answer as to whether—Senator Specter answered it by putting party in—whether you want this to be the first place.

My first reaction was that if we had a catastrophe of this sort, it would be hard for me to imagine that the governor of New York would do something that might be seen in a partisan vein or any governor, that governors under those circumstances would be under enormous pressure and one would think their own fiduciary responsibilities would lead them to make temporary appointments that would be the most distinguished people that wouldn't change in any way the underlying political realities.

Now, you may be sensitive enough to that, that you decide to put party in, although of course, obviously, a Republican governor could pick a Democrat who wouldn't represent any of the views that you represented or vice versa. We have seen this with appointments to regulatory bodies. So it doesn't necessarily answer all the problems.

Let me finally say, as I—only somewhat facetiously, as I have had this discussion with some of your colleagues who have expressed the concern. I said, you might be dead under these circumstances. Why would you care so much about that? When the real important question is, how do we move forward just to make sure that we could govern?

I am indifferent in the end as to whether you want to do it in some explicit way. My judgment would be not to, but there are other important questions here that are more important.

Mr. NADLER. Let me ask a—Professor Tiefer, let me ask the following question: If you had a situation where a catastrophe occurred, who could determine whether—well, first of all, let us assume that a catastrophe occurred and one of the problems with the catastrophe was that transportation mechanisms were down, and so you had a good number of Members of Congress scattered around the country. Could they convene without coming to Washington, or would you have to replace them because they can't get to Washington?

Mr. TIEFER. Well, there is the problem of the constitutional provision that says that if you are going to change the place of meeting, the House and the Senate have to decide to do this.

I am aware that, for example, when the British burned Washington during the War of 1812, I believe they then shifted the place of meeting away from the burning building for an excellent reason.

Anyway, so there is the—I am calling it the technical problem, that they need to agree to move it, and yet they have to get together in order to do the agreeing. Sort of a chicken and egg problem. Assuming, though, that——

Mr. NADLER. Well, do you think that the Constitution could be read as the Congress convening in one place by telecommunication meeting that requirement?

Mr. TIEFER. I would think that in the event of a catastrophe, virtually any solution would prove in retrospect acceptable, yes. So I don't—I am not against that particular solution either. I think that that is true. So why don't I just say, yes, I think that, assuming communications are still functioning, that that is probably—that one way or another, either they are going to convene by the electronic methods or someone is going to tell them by the electronic methods where they are to meet, but the word will go out electronically, get together in wherever.

Mr. NADLER. Let me ask one other—Professor—Mr. Ornstein——

Mr. CHABOT. The gentleman's time has expired. The gentleman is recognized for an additional minute.

Mr. NADLER. Do you think that if we were to have such a constitutional amendment, the appointed representatives should be allowed to run with a full term, or should we say these are temporary, and that is it?

Mr. ORNSTEIN. Well, let me say one of the reasons that I am sensitive to the notion of doing it this way is that if you really pushed up an expedited special election—you are going to give enormous advantages, to begin with, if you hold a special election within a matter of weeks to someone who already has enormous name recognition or otherwise. I am not sure I would want to build in a prohibition against somebody running. It seems to me that if you

make this in an immediate way and you have it for a 90-day term period that that is not enough time for somebody to get such an inordinate advantage that then next time around they have got the kind of leverage that would be there, if, as you see with an appointment to the Senate, somebody is in for, often, a full 2-year period.

So I am reluctant to build in a sort of prohibition against running for somebody under those circumstances.

What I would want to do also is, frankly, pass a sense of the Congress resolution to go along with this that might go out to the governors saying that, in the spirit of the action we are taking and with the power that you will be given, we trust that you will not play politics with this and that you might indeed look toward picking statesman who might have no interest in serving the——

Mr. NADLER. On the other hand, if they pick statesman, maybe they are the people you want to run for the full——

Mr. CHABOT. The gentleman's time is expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Mr. Ornstein, let us follow up on that. As a historian, can you tell us some of the experience we have had with appointed senators? You mentioned some have actually served for a length of time. Do they tend to run or not run?

Mr. ORNSTEIN. Well, it varies; and of course in some instances you have governors who set as a condition of appointment that the person being appointed will not run. We know, just to pick one contemporary example, that faced with the possibility of a vacancy in South Carolina with Strom Thurmond this time, that Governor Hodges of South Carolina announced in advance that he would not appoint, if an appointment were there, somebody who would be a candidate for the term when the term ended.

What we also know is that oftentimes appointed senators do run for election, and I believe—I am not sure of the exact percentages, Mr. Scott, but a very substantial number lose. It is not at all a rarity for an appointed senator who still has that advantage of incumbency to run in his or her own right and then lose election.

Mr. SCOTT. Somebody presented us with a list of the State laws as far as how long it takes to actually elect someone. I know when I was a member of the State house of delegates, my State senator won a congressional seat in the regular November election. I was elected to the State senate, and my replacement in the house of delegates was subsequently elected to the house of delegates in time to serve in the house of delegates beginning in January, middle of January. Why can't you get the machinery going so you can have an election in 15, 30, 45 days?

Mr. ORNSTEIN. Well, there are a couple of problems with that, Mr. Scott.

One is, it doesn't deal with the problem of disability, which as I suggested may be an even more significant problem.

The second is that if you had widespread elections for Congress set in 15 or 30 days, who is going to be able to run? I don't at all mind the process that now—I provided in my testimony that chart that shows by State laws it takes 3 months to 6 months. In that 3-month to 6-month period, which, after all, under normal circumstances, if there are one or two or three vacancies doesn't much

matter, you have got time for candidacies to emerge for people who may not be the best known to establish themselves.

Frankly, that just happened in Oklahoma with Mr. Largent's departure. A candidate who didn't on the surface appear to be the obvious choice managed to establish himself with the voters. If that election had been held in 15 or 30 days, we would have had a different outcome.

Now, maybe it wouldn't have been a qualitatively different, better or worse, outcome, but I don't think you want to get into a situation where you give an inordinate advantage for what would then be not just a 90-day term but might end up being a full 2-year period to people who start with enormous advantages in name, money or otherwise.

Mr. SCOTT. Well, do you have the same problem if you allow an appointment, that certain people would get appointed that wouldn't get elected? You mentioned the situation of incapacity, missing and temporarily incapacitated. Are you going to elect somebody to fill that temporary vacancy?

Mr. ORNSTEIN. No. What I would do is, in effect, I would start with the individual having a prime function here. If the individual Member declared himself or herself incapacitated, if that didn't happen, you would probably want to go down through a list, maybe the two leaders of Congress making that declaration or the governor. But then, once that Member is ready to serve again within what would be whatever you want to make it, a 60-day or 90-day temporary appointment, then that Member comes back and resumes his or her seat.

I don't think you want to get into a situation where, if you are incapacitated or missing and then you are ready to come back, you aren't able to serve.

Mr. SCOTT. That is the present law, but nobody is serving in your spot in the meanwhile.

Mr. ORNSTEIN. You could have a temporary appointment during that time, with the understanding that that temporary appointee leaves office when the incapacitated Member is ready to resume, which I think is the way to do it.

Again, just imagine if you had to take the horrific example that we have all mentioned, United Flight 93 taking off on time instead of 40-some minutes late and hitting the Capitol, burning jet fuel spewed everywhere and a couple hundred Members in burn units, no quorum available. Maybe those Members, some would be out for 3 months or 6 months. Maybe some would be out for 30 days or 45 days. What you would want to do under those circumstances is to have temporary memberships set by governors who could then act as a Congress, have a full representation of the population, and when the Members are ready to return, they resume their seats. People coming into those temporary appointments, with the understanding that they are there temporarily, that it may not be for the full 90-day period.

Mr. SCOTT. Chairman, could I ask one quick question?

Mr. CHABOT. Sure.

Mr. SCOTT. Mr. Tiefer, you can't by House rules prescribe a way for Members to get elected, is that right?

Mr. TIEFER. Correct. That is a statutory matter.

Mr. SCOTT. You mean constitutional.

Mr. TIEFER. Well, constitutional, right—yes. The Constitution prescribes it, and the details are set by statute. Time, place and manner are set by statute.

Mr. SCOTT. So you can't change by House rule—if these widespread vacancies—you can't put people in their spots by either statute or rule? You would have to do it by constitutional amendment?

Mr. TIEFER. If we are talking about creating someone who functions as a full representative. I have distinguished the argument that you don't need a full representative in the Committee of the Whole, but to be a full representative, yes, that would require a constitutional amendment.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Washington, Mr. Baird, the proponent of the constitutional amendment, is recognized for 5 minutes.

Mr. BAIRD. Thank you, Mr. Chair; and thanks to all of the witnesses for thought-provoking testimony.

I am generally of the belief that it is better to plan for things before they happen than after, so, Professor Tiefer, Mr. Relyea, it is probably true that, post-talk, we can justify whatever was done. It just seems to me that the best time to do that isn't—the best time to solve a problem is before it happens, rather than after, and then you try to make the best of it.

Mr. Baker, I commend you. I think you are right that we need to not only look at the issue of House replacement but of Presidential matters as well. My own belief is that we need to have, quite literally, a one or at most two-page document that every member of the media has, that every member of the public accepts, that can be easily understood, that says this is how we replace the President, this is how we replace the House, this is how we replace the Senate, and this is where we go from here.

One of the issues that was raised, and I respect it greatly, is that this body—no one has ever served here who has not been directly elected. It is also true, though, that we have never all been killed simultaneously.

While the principle of direct election is important, there are other principles that are also important to the framers, those principles being separation of powers and checks and balances on the executive, for example, or checks and balance within the Congress by one body in relation to the other body.

I am interested in your thoughts about—and I will just go down the line, starting with Mr. Relyea—relative to a 90-day temporary appointment which would then be followed by election or the choice of, as Mr. Ornstein well pointed out, a very minute number of people representing—relative to the issue of appointment versus checks and balance and separation of power and broad representation, how would you prioritize those?

Mr. RELYEA. It seems to me the historical record suggests that, when a crisis occurs, the crisis in fact causing a death to elected officials at the Federal level, the crisis requires usually executive leadership—that is, the executive asking for certain things to be done, supplemental authority, money and program changes. I don't see why an acting Congress or a Congress composed—a House com-

posed of some acting Members couldn't fill that gap, but in doing so would not be any more or less sensitive to their responsibilities as a check.

Yes—as I say in my testimony, yes, you could grant this authority, but put a clock on it, a sunset provision. Yes, you could grant funds, but let us not go overboard. Let us do it for a year or whatever. It would be that incremental approach. I don't see that being different with this period of temporary Members, any different from if you had the body as it was dully constituted.

Mr. BAIRD. Thank you.

Mr. Ornstein.

Mr. ORNSTEIN. Well, I think that it would be hard to imagine a set of circumstances where the United States wouldn't function. We would get by. We would improvise. We would do things that are necessary. It is not desirable, and it is far more desirable to have a relatively full representation in the Congress under a situation of siege or emergency in the country, highly preferable and partly, frankly, to send the signal to the country that we are—and to the world—that we have a constitutional system, and the role of the House in that constitutional system designated by the framers, the first one mentioned, it shouldn't be shunted aside even under conditions of emergency.

Mr. BAIRD. Mr. Baker.

Mr. BAKER. I agree. I mean, the principle of elected representation is very important, but it seems to me in a crisis situation where you would have a handful of Members who could exercise full legislative powers that is not a very healthy situation, particularly in a crisis. So it seems to me a very modest accommodation to the principle of direct representation, elected representation, to allow for interim appointments for a short period of time until the House can be reconstituted through special elections.

Mr. BAIRD. Thank you.

Professor Tiefer.

Mr. TIEFER. I am reminded by some of the discussion here today that the principle of direct election has a particular meaning in the House of Representatives, which is that it is not a Statewide choice. It is a district choice, and each individual district gets to choose its particular person. That is a principle that cuts across many, many issues.

I guess when I was in the House counsel's office, I would see many of them, where you are talking about whether you expel a Member by vote of the whole House, whether you talk about reapportionment and who draws up the plans. So it is a—what you do when you do have an incapacitated individual Member. So, given that there is a 99 percent chance at least that we won't have such a catastrophe, I keep in mind that I don't like incursions into the general principle that go in the Constitution as a big sign that says the principle is no longer so important on the sub 1 percent chance that it might turn out that we needed to have that exception made.

Mr. CHABOT. The gentleman's time has expired.

All time is expired at this point. We appreciate the panel's testimony here this afternoon. It has been very, very helpful and I think answered many of our questions very, very well.

I want to again thank Mr. Baird for focusing his attention on this important issue and making us think the unthinkable.

I ask unanimous consent that the Members be permitted to submit additional materials for the record for a period of 7 legislative days; and if there is no further business to come before the Committee, we are adjourned.

[Whereupon, at 2:11 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

The purpose of this legislative hearing is to address H.J.Res. 67, an amendment to the Constitution proposed by Mr. Baird, which would authorize governors to temporarily appoint Representatives to take the place of those who have died or become incapacitated when 25% or more of all Representatives are unable to perform their duties. Ms. Lofgren has introduced a similar proposal.

Our Constitution is the bedrock on which the oldest constitutional republic rests. Over the course of well over two centuries, only 27 amendments to our Constitution have ever been adopted, including the first ten amendments that constitute the Bill of Rights and one amendment that repealed another amendment. The last amendment was adopted in 1992, a full 203 years after it was first proposed. We should, of course, tread most carefully and deliberately when considering altering our Constitution.

As the Congressional Research Service has pointed out, Representative Baird's proposal is not the first of its kind to have been introduced. From the 1940's through 1962, the issue of filling House vacancies in the event of a national emergency generated considerable interest among some Members of Congress during the cold war with the former Soviet Union. More than 30 proposed constitutional amendments which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives were introduced from the 79th through the 87th Congress. The House has never voted on any of these proposals.

Many of the current issues raised and policy arguments offered in support of or in opposition to the temporary appointment of Representatives are the same as those that were made 50 years ago. For example, in 1954 Senator Knowland stated that such an amendment "is a form of insurance which, of course, we hope will never have to be used, but, in view of the fact that we are on notice . . . that it would be conceivably possible to eliminate the House of Representatives . . . by a single attack on the Nation's Capital, I believe that we can no longer, as prudent citizens and as prudent Members of the House and the Senate, ignore that possibility." The Senate Report accompanying S.J.Res. 39 that same year warned that "Acts of violence may encompass attacks by atomic or hydrogen weapons, germ warfare, or even wholesale assassination of Members of the House by less spectacular weapons."

The events of September 11, 2001, have raised additional issues. Suicidal terrorists may act independently from sovereign nations and may not be deterred from using weapons of mass destruction because of the possible consequences for their own citizens. On the other hand, the situation in the 1950's may have been much more dire than it is today because a nuclear attack was expected to occur, if at all, with overwhelming force, destroying much if not most of the American land mass.

Opponents of an amendment argue that allowing governors to appoint Representatives temporarily would depart from a foundational principle under which the House has kept close to the people and each Member has taken his seat only as a result of direct election by the voters in the Member's district. Such appointments might also contribute to unrest or fear among the nation's citizens by casting doubt upon the government's ability to respond to crises. Also, as Representative Snyder has written, the states, rather than Congress, may be in the best position to provide for expedited election procedures in emergencies. Further, procedural concerns about constituting a quorum in order to conduct legislative business when certain Members may be incapacitated could be resolved by modifying House rules, rather than by amending the Constitution.

In addition, the appointments also could result in a change in the party control of Congress if governors' appointees were of a party different from that if their predecessors. This shift could result in a change in the legislative agenda, and the actions of the short-term appointees could have long-term effects.

In addition to discussing the proposed text of a constitutional amendment today, we should look to and learn from our strong and resilient nation's history of responding to national emergencies. We should also consider whether there are more or equally pressing problems with current provisions providing for continuity in government.

With those considerations in mind, I look forward to hearing from our witnesses today.

PREPARED STATEMENT OF THE HONORABLE BRIAN BAIRD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

INTRODUCTION

Let me begin by thanking the chairman and ranking member for holding today's hearing. We first began to discuss this matter following the September 11th tragedy and at that time the Chair and Ranking Member committed to holding a hearing early this year. They have followed through on that promise and I am grateful for their leadership.

Let me also thank the outstanding panel of witnesses for today's hearing. I read with great interest your written testimony and found it to be both informative and thought provoking. I appreciate the time you have given to this important matter and I have the utmost respect for your knowledge and experience. You have clearly added greatly to the debate and information about this topic.

My comments today will first address the need for and merits of the proposed amendment. Then, I will offer responses to some of the concerns and constructive critiques that have been presented both within the discussion today and in the months since this amendment was first introduced.

THE PRESENT SITUATION

On the evening of September 11th, as flames poured from the collapsed trade centers and the Pentagon, and as our nation and this Congress struggled to comprehend and respond to that horror, I began to consider another, now apparently equally imaginable, horror. And I asked myself what the media would tell our citizens if it were the Capitol building, or perhaps much of the capitol city that lay in ruin and flames. Six months ago, this idea might have seemed alarmist, indeed possibly irrational. Now it seems to me more irrational to not consider such a possibility.

The facts are these. Throughout the world, and indeed within our own borders, there are people who despise our country, our government, and everything for which this nation stands. And throughout the world today, in schools, religious institutions and organizations, young people by the tens of thousands are being taught that same hatred and are learning the tools of terror. In a time when weapons of mass destruction are increasingly available within nations of varying stability and regimes of known hostility, we must consider the likelihood that some of those who carry such hatred would stop at nothing to acquire and use those weapons. And we must recognize that this capitol, as the symbol of American freedoms, would be among their most likely targets.

On any given day, and especially on special occasions such as the recent State of the Union Address, virtually all members of the Congress, the Executive Branch, and the Supreme Court are present and going about their duties within a geographic radius far smaller than the blast zone of even relatively modest nuclear weapons. Thus, we must acknowledge the possibility that a single terrorist act could virtually eliminate most of the members of those bodies. And, given that possibility, we must ask ourselves, what would happen if that were to occur. What would happen if the very institutions and individuals entrusted with national decision making were eliminated simultaneously? Who would be left to answer that question and under what procedures and constitutional authority would they do so?

The Constitution and various statutory acts describe a line of succession to the Presidency. So too, the Constitution provides that vacancies in the Senate can be filled by appointment of governors. Vacancies in the House, however, must be filled by elections. Therein lies the matter this amendment addresses.

Each of us who serves in the House is proud to be a member of the only branch of the Federal Government to which one must be elected directly by the citizens.

The founders clearly valued that direct connection to the citizenry and kept the term of office short to further ensure the responsiveness of the body. No one in the entire history of this nation has ever served in this body without being directly elected. It is equally true that this body has never lost most of its members in a single instance.

Under current circumstances, states set their own timetables and methods of special elections. In most states, this process takes at least several months; in some it takes even longer. If large numbers or all members of the House were to perish, the Congress would be left without a functioning House until such time as special elections could bring the body to full strength or at least to a quorum as established within the Constitution. In a time of national crisis and uncertainty, the last thing the nation and the people would need is a constitutional crisis or a government unable to function within constitutional principles.

To address this situation, HJ Res 67 proposes to amend the United States Constitution to ensure ongoing Congressional functioning in the event of large scale losses of Congressional members. The resolution provides that, in the event of one quarter or more members of the House of Representatives being killed or incapacitated and unable to serve, governors of the respective states would be authorized to appoint replacements within seven days, followed by special elections with ninety days.

This amendment provides for a constitutional mechanism of rapidly reconstituting the House as a body representing the states on a population proportionate basis and maintaining the absolutely fundamental principles and responsibilities of separation of powers and checks and balances within the federal government. It also allows for the entire nation to be represented in the people's House should the Congress need to enact sweeping changes in public policy immediately following a terrorist attack.

Let us do all in our power to ensure this amendment is never needed, but let us also recognize that if that terrible event does occur, we must provide a clear, constitutional answer, to the question, "Now what?"

RESPONSE TO CRITICS OF THIS AMENDMENT

A number of thoughtful individuals have raised questions and concerns about this amendment. Allow me to briefly address some of those questions.

Perhaps we should begin by responding to those who assert that the amendment is unnecessary because such an attack could never occur or could not kill all the members of the House. A constituent of mine recently described a photo he took while serving in World War II and assigned to duty in Nagasaki after the atomic bomb was dropped. As he described the image, and as we have all seen, the devastation in the blast zone was total. In the words of this man, "There was nothing at all standing higher than your knees." Clearly, a nuclear weapon could kill everyone in the Capitol, the office buildings, the Supreme Court and surrounding areas. To hope otherwise is simply not realistic.

There are also many who have told me they "Just prefer not to think about that." I understand and to a large extent share that feeling. But this body is entrusted with the responsibility of ensuring that our Constitutional Democratic Republic will persevere. If there is a threat to that constitution, even if contemplating that means we must look squarely at our own demise, then we have an obligation to face that threat no matter how unpleasant or disconcerting it may be.

WHAT CONSTITUTES A QUORUM IN THE HOUSE?

Some who are willing to acknowledge the possibility of a devastating attack have maintained that a few members would certainly survive and those few members could serve as the House and figure out what to do. Many members of the House have heretofore been unaware that, although the Constitution itself identifies a majority of the membership as necessary for a quorum, the rules adopted at the beginning of the session actually state that a quorum is a "majority of those Members chosen, sworn and living."

In theory, and according to testimony of at least one of the witnesses today, that means that if only three members survive an attack, two would constitute a quorum. Perhaps this is technically correct, but there is no guarantee that anyone would survive an attack. And if only a handful survive, is a quorum of three true to the principle of diverse representation that guided the founders? Of equal importnace, would the public accept legislation, perhaps including a declaration of war and even the selection of the President in the person of the Speaker of the House, by two or three people?

Ironically, some who have criticized the proposed amendment have argued that the triggering threshold of a quarter of the members lost would have equated to rel-

atively few individuals in the original Congress. That is true mathematically, and there may be merit to discussing a more stringent threshold, perhaps even setting it at a loss of half the membership.

But it is hard to understand how those same critics then justify having the House of Representatives consist of three members. Surely, the framers of a Constitution that almost unraveled over the principle of adequate representation of all states could not have accepted a House made up of only three members. And it seems highly unlikely that the states would have joined to ratify such a document.

Should a handful of survivors claim legitimacy as the House, it would seem almost certain that residents of non-represented states would file suit and express complaints that their rights to representation were being violated. But who would hear this case if the members of the Supreme Court were also lost in the attack?

A further irony of this argument is that it contradicts the concerns of those who worry about the lack of a political party requirement in the proposed amendment. If we are concerned that governors could make partisan appointments in replacing the full house, are we not far more concerned about the partisan implications of three survivors, potentially all from the formerly minority party, making the laws for the nation?

Unless we are certain that some members of the Congress would survive, which we cannot be, and unless we are willing to tolerate a handful of members serving as the entire Congress, we must establish a constitutional mechanism for rapidly replacing the missing members of the House.

PARTISAN APPOINTMENTS

After the issue of deviating from the tradition of direct elections, the matter of party affiliation is perhaps the second greatest concern about the proposed amendment. Admittedly, allowing Governors to appoint replacements to the House is not without problems. Perhaps the greatest concern is the potential for such appointments to be politically motivated, possibly leading to substantial changes in the political makeup of the House. This concern is exacerbated by the fact that governors would also be able to appoint Senatorial replacements.

In response to this possibility, it has been suggested that governors be required to appoint persons from the same political party as that of the deceased members. This could reduce the potential for partisan appointments and preserve the pre-existing balance of the House, but it also creates complications. From a practical standpoint, not all states have party registration, making it difficult to determine legally who is qualified for appointment. Therefore, some mechanism would be needed to establish a definition of eligibility based on party identification. Still, a potential appointee could theoretically declare a different party affiliation for the purpose of appointment, then switch allegiances upon arrival in Congress.

Political restrictions would also run the risk of dismissing the wishes of independent, unaffiliated voters. Increasingly, voters are splitting their tickets and voting more for individual candidates than party identification.

Even within the parties, there are tremendous ideological differences between potential candidates or nominees. As difficult as it might be to require party qualifications for nomination, establishing ideological criteria would be still more problematic.

Beyond these practical considerations, it can also be argued that, in time of crisis, governors should be able to pick the best person for the task. While there might be merit in encouraging selections from the same party as the deceased, if a more qualified candidate is available to serve, that should be the first priority.

Finally, and most importantly, the United States Constitution has never referenced political parties in any way and has never made party affiliation or any other ideological position a criterion for service in government. While times have changed and political parties are an established element of modern political life, codifying parties in the constitution and making party affiliation a requirement for service in Congress might set a more dangerous precedent than the temporary risks of a ninety day gubernatorial appointment.

While acknowledging the potential for governors to abuse their power or take advantage of a crisis, it must be emphasized that, under the provisions of the proposed amendment, the appointments to the House would be temporary. Special elections would be held within 90 days to correct any such maneuvering and restore the balance according the will of the people. What is more, as a further check against temptations to abuse their authority, it should be kept in mind that the Governors themselves would be held accountable for their actions in subsequent elections.

THE INADEQUACY OF SPECIAL ELECTIONS UNDER PRESENT LAWS

Perhaps the strongest objection to this amendment is that it deviates from the tradition of special elections. Two issues must be addressed in response to that concern. First, in lieu of the mechanism described in this amendment, what are the possibilities and challenges to rapid special elections of House members?

Some critics of the amendment have maintained that states could simply call special elections to replace the members. That, in my judgment, is not practical under present laws. In the process of crafting the amendment, I asked a number of auditors to estimate the quickest possible time it would take them to put together an election under a crisis situation. The average answer was at least 7 or 8 weeks for a primary, slightly shorter for a subsequent general election. It happens that the current national president of the National Association of Auditors hails from Pierce County, Washington. I asked her the same question and, based on her many years of experience, she offered a similar estimate.

Under currently used election technologies, it would be exceedingly difficult to conduct an election in less than seven weeks. During that time, candidates would have to file for office, their legitimacy and qualifications would have to be checked, election materials, e.g. ballots, voting machines etc. would have to be printed and distributed, and personnel would have to be prepared to conduct the election and process ballots.

If a primary and a general election were to be held, this process would have to be repeated, but (assuming decisive primary results and no recounts or disputes) the general election could likely take place more quickly, perhaps even within a few days of the primary results being finalized. Still, under even optimistic scenarios and current technologies, the House of Representatives would be essentially left unfilled for at least a month and very likely much longer.

It is possible to imagine new technologies that could make the election process faster, for example, through remote voting via the internet, but those technologies are far from being widely accessible, tested, or publicly accepted. Consideration of more rapid election procedures must also take into account the possibility that any such election would be taking place in a time of national crisis and possible disruption of services. Mail delivery, electronic communications and even basic transportation could be interrupted, thereby increasing the risks of delays or possible disenfranchisement of certain voters.

Perhaps more important than the technical and logistical challenges is the matter of giving voters ample time for deliberation and reflection. A hurried special election might provide only two or three weeks for candidates to file and convey their positions and qualifications to voters. There is already a need to examine and improve the ways voters are informed in normal elections, but in a crisis situation, with just weeks between candidates filing and the election, voters might find it difficult to gain sufficient information about the backgrounds and issues that distinguish candidates. What is more, in a hastily called election, members of our armed forces and other citizens living abroad might be disenfranchised.

Finally, even in the most optimistic scenarios, the constitutional provisions of a bicameral body, checks and balances, and separations of powers would almost certainly be violated in some manner for weeks or months.

SEPARATION OF POWERS AND CHECKS AND BALANCES

While the practice of direct election to the House is tremendously important, the more fundamental principles of checks and balances and the separation of powers are arguably more important to our governmental structure.

Having rebelled against the King of England, the framers of the Constitution were profoundly guarded against vesting excessive powers in the hands of a single leader. Their knowledge of the dangers of unrestrained centralized power, the pragmatic need to form a union of states with diverse interests, and their commitment to the rights and wisdom of individual citizens all contributed to grave concerns about granting unrestrained powers to a single executive or the executive branch.

Those concerns are codified in multiple ways within the constitution. The constitutional prerogative of Congress to override Presidential vetoes; the Congressional "power of the purse" to levy taxes and appropriate funds; the Congressional role in regulating domestic and international commerce; the advise and consent functions and approval of Presidential nominees; the right to declare war; the power of impeachment; Congressional oversight and approval of the counting of electoral votes; Congressional authority to determine procedures for Presidential succession, all place critical responsibilities and powers within the legislative branch and provide checks on executive authority. What is more, the constitution exclusively reserves

to the Congress and to the states the responsibility and procedures for amending the constitution itself.

Comparable issues of checks on authority and separation of powers are also evident in the relationships between the House and the Senate. Without enumerating the well known differences in House and Senate authority and the accompanying checks on the powers of each, the fundamental principle is that, in our bicameral system, legislation must ultimately be passed by both bodies in order to become law.

CONSTITUTIONAL THREATS IN TIME OF CRISIS

What would happen to these fundamental constitutional principles if large numbers or all members of the House of Representatives were killed?

Lacking a functioning House of Representatives, government activity would either be placed on hold, leave Congressional authority solely in the Senate, or be assumed by the executive branch. The first scenario would leave our government in paralysis for weeks if not months in time of national crisis. The second and third possibilities might allow the government to function, but only in a way that would clearly violate both the letter and spirit of the constitution. Further, it must be acknowledged that in the event of catastrophic losses, not only would the government be functioning without a Congress, the Presidency might well be filled, under statute, by a lower level cabinet official who was never elected by the people and may be unknown to most citizens.

If the framers of the constitution had wished to place such powers in the hands of the executive branch or the Senate alone, they could have done so. They chose not to for good and well-established reasons, and the structures they established have served this nation through two world wars and countless other crises. What the framers did not address was the possibility that the entire House of Representatives could be instantaneously killed. It falls then to us to address that possibility in a way that will preserve the vital principles of the constitution and allow our nation to continue even in the face of catastrophic losses.

TEMPORARY APPOINTMENT

Which brings us again to the proposed amendment. Whatever problems it may present, the most expeditious way to fill House seats would be through direct appointment by Governors, followed by special elections. In many instances, former members of Congress, who are already familiar with the House and its procedures, could be chosen by governors and could be in place to begin service within just a few days.

This would allow the Congress to resume its functions, and thereby preserve the vital constitutional checks and separations of powers, with minimal interruption and without the need for expanded executive powers or risk of a constitutional crisis. With replacement members in place and the Congress operational again, states could then go about a more deliberative process of conducting special elections.

CONCLUSION

Fundamentally, HJ Res 67 is designed to preserve the constitutional role of Congress during national crisis. The provisions it prescribes would only come into effect in the event of unprecedented losses of House members. Should those losses not occur, the existing procedures would be unaffected and the constitutional process of direct elections to replace House members would continue unchanged. But if the unthinkable should come to pass and large numbers of the house are lost, we simply must have absolutely clear constitutional and statutory procedures in place to deal with the situation.

Any amendment to the constitution involves a balancing of risks and benefits. Indeed, such balances were part of the original draft and are part of the Constitution as it exists today. Ultimately we must make choices and, in this instance, choosing not to act would expose the most critical principles of the constitution and our nation to greater risks than would the enactment of measured, reasoned precautions.

Let us hope and work to ensure this amendment is never needed, but let us act soon to ensure the principles of that great document and the republic it defines will be preserved.

PREPARED STATEMENT OF THE HONORABLE BRAD SHERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for holding this important hearing on H.J. Res. 67, which provides for the temporary filling of vacancies in the House of Representative.

While the focus of the hearing is congressional succession, I appreciate the opportunity to submit a statement regarding legislation that I recently introduced regarding presidential succession.

No matter how archaic or antiquated provisions of our Constitutional structure may seem, when the time comes to employ these provisions, they are the law of the land. An issue that has all but escaped the attention of Congress and the American public provides an example: presidential succession—who becomes chief executive if both the President and Vice President have died or are otherwise incapacitated. The issue has not been discussed in Congress in more than a decade. We all know that if the President dies or is impaired, the Vice President succeeds to that office. We all know that a Vice President who thus becomes President can appoint a successor to the Vice Presidential office, subject to House and Senate confirmation with the attendant delay. However, there could come a time, after the death or removal of the President from office, when we would go for months or even years without a Vice President, as was the case when Gerald Ford became president after the resignation of Richard Nixon. One can imagine the crisis we might have faced had President Ford faced some untoward calamity. Succession laws ought to provide two things: certainty and continuity. The present presidential succession statute does provide certainty. It states that if there are vacancies in the offices of both the President and Vice President, the next person in line is the Speaker of the House, then the President Pro Tempore of the Senate, followed by the various cabinet officials in order of the seniority of their departments. This system provides for certainty as to who holds the Office of President of the United States. However, Mr. Chairman, we also need continuity, and by this I mean continuity of policy. Our friends and our adversaries around the world should know that even if there is no one serving as Vice President, the next person in line will carry on the same policies. The securities markets should know that a heart attack may change the person in the White House but not radically alter economic policy. Most important, it is key that any potential assassin not believe that he or she can radically change the United States' foreign or domestic policies with a bullet. Unfortunately, our present laws do not meet that standard because the person in line after the Vice President may not be of the same political party. In 1974, with Gerald Ford serving as President, the country could have radically changed policy if House Speaker Carl Albert, a Democrat, had assumed the presidency. From 1886 to 1947, we had a statutory scheme that provided both certainty and continuity by providing that after the Vice President, the line of succession went to the cabinet officers in the chronological order in which their departments had been created. This guaranteed that potential successors would be of the same party as the incumbent. We changed the statute in 1947 because it was believed that the first four persons in line to become President should be elected officials. Mr. Chairman, I believe that we can maintain the policy of the line of presidential succession extending to elected officials, rather than appointed officials, but still ensure continuity. That is why I have introduced H.R. 3816, the Presidential Succession Act of 2002, which provides that every President may file with the Clerk of the House and the Secretary of the Senate an official document indicating who shall be second and third in the line of succession, chosen from among the Speaker of the House or the House Minority Leader, and the Majority or Minority Leader in the Senate. Under my legislation, the persons who are second and third in line would be Members of Congress held in high esteem by their colleagues and of the president's political party.

Again, thank you, Mr. Chairman, for holding this hearing.

NOTES ON PROPOSED CONSTITUTIONAL AMENDMENTS ON TEMPORARY APPOINTMENTS OF MEMBERS OF THE HOUSE BY MICHAEL DAVIDSON, FORMER SENATE LEGAL COUNSEL

Two proposed constitutional amendments—H.R.J. Res. 67, introduced by Representative Baird on October 10, 2001, and S.J. Res. 30, introduced by Senator Specter on December 20, 2001—would provide for appointment of Members of the House by the Governors of their States to serve temporarily until special elections are held to fill vacancies caused by the death or incapacity of significant numbers of Members. The amendments have been referred to the House and Senate Committees on the Judiciary, each of which has a subcommittee with jurisdiction over proposed constitutional amendments. These notes collect historical information that may be of some use in the consideration of these proposals or variations of them.

1. The Proposed Amendments

The proposed amendments each provide for a triggering circumstance, a threshold percentage of Members of the House who are "unable to carry out their duties because of death or incapacity." H.R.J. Res. 67 sets that amount as 25 percent or more of the House (109 or more Members); S.J. Res. 30 doubles the triggering threshold to 50 percent or more (218 or more).

Once the authority is triggered, under both proposals Governors "shall" appoint qualified individuals to take the place of dead or incapacitated members "as soon as practicable" but not later than 7 days after death or incapacity "has been certified." Neither resolution indicates who will have the power to make those certifications. Appointed individuals shall serve "until a member is elected to fill the vacancy resulting from the death or incapacity" in elections held during the 90-day period that begins with a temporary appointment, except for a special rule that applies when a regularly scheduled election falls within the 90-day period or 30 days thereafter. Temporary appointees shall be eligible to seek election in a special or regularly scheduled election. They shall have all powers and duties of members of the House.

S.J. Res. 30 (but not H.R.J. Res. 67) would provide that temporary appointees "shall be a member of the same political party as the Member of the House of Representatives who is being replaced." Both provide "Congress shall the power to enforce this article by appropriate legislation."

2. The Constitution (Before the Seventeenth Amendment)

The principle of election of House Members "by the People of the several States" has four primary applications. First, representatives are apportioned among the states "according to their respective numbers," amend. XIV, § 2 (amending Art. I, § 2, cl. 3), based on a decennial "actual Enumeration," Art. I, § 2, cl. 3. Second, the Supreme Court has determined that in drawing congressional district lines within states "the command of Art. I, § 2 that Representatives be chosen 'by the People of the several States' means that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7–8 (1964). Third, the regular method of selecting Members is by biennial elections "by the People," in which the electorate is defined as broadly as the state defines it for the most populous branch of the state legislature, Art. I, § 2, cl. 1, plus the requirements of voting rights amendments on race, gender, poll tax, and minimum age. Fourth, "[w]hen vacancies happen" in any state's representation, "the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Art. I, § 2, cl. 4.

The Senate began in a different place. No matter what the state's population, the Senate is "composed of two Senators from each State," who would be "chosen by the Legislature thereof." Art. I, § 3, cl. 1. As adopted, the Constitution made no provision for filling a vacancy that arose while a state legislature was in session, for presumably the legislature would proceed to fill that vacancy. But "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." Art. I, § 3, cl. 2.

At the Convention, a provision on filling House vacancies first appeared in the August 6 report of the Committee of Detail: "Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State, in the representation from which it shall happen." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 387 (Norton, reissued 1987) ("Madison"). Madison records (at 414) that the Convention agreed to the provision without discussion. In its September 12 report, the Committee on Style proposed the language finally adopted. Madison, at 617. By providing that State Executives "shall" issue writs of election when vacancies happen, the final text of the Constitution makes it their obligation to do so.

Justice Story observed that the House vacancy clause "does not seem to have furnished any matter of discussion, either in, or out of the convention." "It was obvious," he wrote, "that the power ought to reside somewhere; and must be exercised by the state or national government, or by some department thereof." Friends of the states preferred resting the power with state executives while those of the national government were willing to do so "if other constitutional provisions existed sufficient to preserve its due execution." In any event, the procedure for filling House vacancies "has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality." Joseph Story, *Commentaries on the Constitution of the United States* § 344, p. 248 (Rotunda & Nowak ed. 1987).

The Committee of Detail's provision on temporary Senate appointments—that "[v]acancies may be supplied by the Executive until the next meeting of the Legislature," Madison, at 387—prompted a debate in the Convention on August 9. James Wilson objected unsuccessfully that filling vacancies by executive rather than legislative action "removes the appointment too far from the people." *Id.* at 415. In support of the committee's temporary appointment proposal, Randolph "thought it necessary to prevent inconvenient chasms in the Senate." Some state legislatures met only once a year. Because the Senate would be smaller than the House and also have greater responsibilities, (the committee's August report would have vested in the Senate the power to appoint Ambassadors and Judges of the Supreme Court), vacancies in the Senate "will be of more consequence." *Id.* The Convention agreed temporary appointments by governors during recesses of state legislatures.

In a different immediate context, namely, how many senators each state should have, Justice Story highlighted issues about vacancies that may also bear on temporary appointments. It was "indispensable" that the Senate "should consist of a number sufficiently large to ensure a sufficient variety of talents, experience, and practical skill for the discharge of all their duties." Story, § 359, p. 256. Additionally, "a state should not be wholly unrepresented in the national councils by mere accident, or by the temporary absence of its representative." *Id.*, § 360, p. 257. "In critical cases," Story continued, "it might be of great importance to have an opportunity of consulting with a colleague or colleagues, having a common interest and feeling for the state." *Id.* at 257–58.

3. The Seventeenth Amendment

The Seventeenth Amendment provides that senators for each state shall be "elected by the people thereof," as representatives are. As for House elections, the electorate in Senate elections is to be as extensive as the electorate for the most numerous branch of the state's legislature, Amend. XVII, par. 1, in addition to requirements of the Constitution's voting rights amendments.

The Seventeenth Amendment also changed the method for filling "vacancies" in the representation of any state in the Senate Just as the Constitution always provided for the House, "the executive authority of such State shall issue writs of election to fill such vacancies." As in the original Constitution, the Seventeenth Amendment provided for temporary appointments to the Senate pending special elections, although it changed the method of making them. Rather than giving directly to each state's Executive the power to make temporary Senate appointments, the amendment provides that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Amend. XVII, par. 2.

The story of the adoption of the Seventeenth Amendment is detailed in 1 Robert C. Byrd, *The Senate 1789–1987*, at pp. 389–406 (1994). Two points about the history of the Seventeenth Amendment may bear on the present question.

First, although the call for direct democracy was the engine that ultimately drove adoption, Senate vacancies were a factor: "Another objection to the selection of Senators by legislatures was that often a State went unrepresented or only half-represented in the U.S. Senate because of the inability of many State legislatures to agree on any one candidate." *Amendments to the Constitution: A Brief Legislative History*, S. Prt. 99–87, at 25 (1985).

Second, although the amendment concerned election to the Senate, not the House, neither the initiative for nor substance of it was ever thought to be more the province of the Senate than the House. As Senator Byrd relates, the first resolution on popular election of senators was introduced in the House in 1826. *Byrd*, at 390. Between 1893 and 1902, the House passed five resolutions on direct Senate elections. *Id.* at 398. In the Congress that finally passed it, the House again kicked off consideration by sending a resolution to the Senate. *Id.* at 401. Because the two chambers had different views on an important matter, agreement to the amendment ultimately required a House-Senate conference. *Id.* at 402.

4. Prior Proposals for Filling House Vacancies

There were more than 30 proposed constitutional amendments, from the end of World War II through 1962, on temporary appointments to fill House vacancies. *House Vacancies: Selected Proposals to Allow for Filling Them Due to National Emergencies*, RS 21068, at 5–6 n.3 (Nov. 16, 2001) (Sula Richardson, Government and Finance Division). The greatest number were introduced in the House, which did not pass any. Three proposed amendments passed the Senate, in 1954, 1955, and 1960. The last hearing appears to have been one held in the House in 1961.

a. 1950 and 1952—S.J. Res. 145, 81st Congress, and S.J. Res. 59, 82nd Congress

In the Senate, the first efforts were by Senator Knowland who introduced amendments in 1950 (S.J. Res. 145) and 1952 (S.J. Res. 59). The major difference between them was that the former provided for filling vacancies "whenever the number of vacancies in the House of Representatives exceeds the number of Representatives in office," a number that would usually translate to 218, while the latter would have lowered that to 145 (a third of the House). In testimony in 1952, Knowland made clear that his concern was based on the possibility of nuclear explosions. *Constitutional Amendments: Hearings Before a Subcommittee of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. 2 (March 20, 1952). While "[t]he Senate could be reconstituted within a few days," the House could not. That, he said, "is a very clear weakness in our constitutional set-up which might break down the legislative process of the Government in time of war." Knowland asked: "If you could not organize the House, how could you make the necessary appropriations for emergency rehabilitation work which would be required immediately and all of the other legislation this country would require in time of war?" *Id.* at 3.

Senator Kilgore, the subcommittee chairman, observed that the proposal required "a major loss in the House before the [temporary appointment power] could be invoked, whereas the death of one Senator permits the Governor of the State to appoint a successor." *Id.* Knowland agreed: "I am not proposing here to change the constitutional provision insofar as the normal death or resignation of a Member of the House is concerned, because that is amply taken care of by the Constitution." *Id.* In response to a question from subcommittee counsel, Knowland made clear that by "vacancies" he meant the death (or resignation) of Members, not their incapacitation, saying "I do not think you can create a vacancy while the man is living. . . . There was no intention of giving any power to declare a seat vacant of a man who is incapacitated." *Id.* at 6.

b. 1954—S.J. Res. 39, 83rd Congress

The following Congress, Senator Knowland, then serving as Majority Leader, renewed his effort to pass a temporary appointments measure. His proposal, S.J. Res. 39, provided that the Speaker (or Clerk if no Speaker) certify to the President whenever "in time of any national emergency or national disaster" the total number of House vacancies exceeded 145 (one-third of the House). The President shall then issue a proclamation declaring the facts, upon which Governors would have the power to make temporary appointments for vacancies that exist within sixty days after the proclamation. Temporary appointees would serve until their seats were filled by election. *Appointment of Representatives in Time of National Emergency: Hearing on S.J. Res. 39 Before a Subcommittee of the Senate Comm. on the Judiciary*, 83rd Cong., 2d Sess. 1 (1954).

Knowland placed in the record an Eisenhower administration letter that "strongly favor[ed] action by Congress to close this gap in our national security" but deferred to Congress on the method for doing it. *Id.* at 5; *see also id.* at 17 (letter from Assistant Secretary of State Thruston Morton expressing his Department's view that in the event of national emergency "it would be important—from the point of view of legal requirements and national morale—for Congress to be able to meet and legislate promptly without the necessity of special elections throughout the Nation, with the attendant campaign, to fill a very large number of vacant seats in the House.").

On whether Governors should be required, in order to maintain party balance, to appoint a member of a deceased member's political party, Knowland told the subcommittee "it would be a mistake to tie the constitutional hands of the Governor. I think it would average out in any event." *Id.* at 7. Senator Francis Case, in testimony before the subcommittee in support of his own amendment proposal, questioned Knowland's resolution in one respect. Rather than having a numerical line that would allow temporary appointments if there were 145 or more vacancies but not if there were 144, Senator Case said "[t]he simpler thing, it seems to me, to do is to use the same language as is done in connection with vacancies in the Senate." *Id.* at 14.

The Committee on the Judiciary recommended passsage of S.J. Res. 39. *Appointment of Representatives in Time of National Emergency*, S. Rep. No. 1459, 83d Cong., 2d Sess. 1–2 (1954). In addition to a nuclear threat, it expressed concern that "through germ warfare, or in the course of violent attacks by irresponsible partisans, the House of Representatives would be compelled to function without a majority of its Members." *Id.* at 2; *see also id.* at 3 (acts of violence may also include "wholesale assassination of Members of the House by less spectacular weapons"). One result is that the House might then lack a quorum for doing business. Even if House rules allowed less than a majority to constitute a quorum, "in such times

exceedingly important legislation would be adopted and any disenfranchisement to a substantial portion of our Nation would represent a distinct loss." *Id.* at 3. While hoping that the authority provided in the resolution might never be used, the committee said "it would be the height of folly to leave a constitutional gap of this nature in a representative government such as ours." *Id.* at 4.

The proposed amendment passed the Senate by a vote of 70 to 1. 100 Cong. Rec. 7669 (1954); *see id.*, 1758–69 (full debate). During the debate, Senator Case reiterated support "for the filling of vacancies in the House of Representatives in the same way that vacancies in the Senate are filled, to wit, by appointment by the Governor of the State until the vacancy is filled in the way the people of the particular State involved may direct by act of its legislature." *Id.*, 7661; *see also id.*, 7662 (suggesting that temporary appointments might be limited to 90 days).

Senator Cooper observed that the proposed amendment "expresses a concern that even if the gravest consequences should affect the membership of the Congress," there be "a constitutional method of meeting the contingency, and of preserving . . . a government of laws, rather than a government of men." *Id.*, 7667. He recognized that the amendment would change "for a limited time" the concept that members of the House are elected not appointed. The reason doing so "derive from circumstances which could not have been foreseen at the time of the adoption of the Constitution." *Id.* To hold as closely as possible to the idea that members of the House are elected by the people, "[l]imits on the tenure of the temporary appointment should be provided." *Id.*, 7668. Senator Knowland acknowledged the benefit of further study of the length of temporary appointments, suggesting it be done when the House considered the amendment. *Id.*

c. 1955—S.J. Res. 8, 84th Congress

In 1955, Senator Kefauver became chairman of the Subcommittee on Constitutional Amendments. In the course of several Congresses, he sought adoption of a temporary House appointment amendment.

As introduced, S.J. Res. 8 would have provided that in the event of a "disaster" that causes "more than a majority of vacancies" in either House, governors shall make temporary appointments that lasted until the people filled the vacancies by election. The subcommittee held what appears to be the fullest hearing on the subject. *Appointment of Representatives: Hearing on S.J. Res. 8 Before a Subcommittee of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955). The hearing evidently persuaded the Judiciary Committee that the Seventeenth Amendment's temporary appointment mechanism was sufficient for the Senate and that the proposal should be limited to the House. The statement of a condition in the amendment, that it apply in the event of a "disaster," was sharply questioned at the hearing, and by the committee in its report. Among the questions were what officer of government would proclaim the disaster; how would that officer determine which vacancies were caused by it; and what if some vacancies had natural causes? S. Rep. No. 229, 84th Cong., 1st Sess. 3 (1955).

The committee kept the requirement that temporary appointments could be made only if the total number of House vacancies exceeded half the body's authorized membership. It reported to the Senate that "having eliminated reference to a disaster the committee wanted to be sure that utilization of this authority would be sufficiently restricted, so that it would remain an emergency measure for the preservation and continuity of representative government. The maintenance of a large number of vacancies as a prerequisite to the use of the power, constitutes insurance that it will be used only in the event of a disaster." *Id.* at 3.

The committee received letters from the House and Senate parliamentarians that described established precedents that only living Members are counted in determining the total number of which a majority constitutes a quorum. *Hearing* at 23–26 (letters from Lewis Deschler and Charles Watkins). The precedents persuaded the committee that any point of order in the House to a quorum objecting to a quorum based only on the number of living, chosen and sworn members would probably not be sustained. *See* S. Rep. No. 229, at 2. Nevertheless, it reiterated the view expressed in its 1954 report that even if the House could proceed without a majority of its authorized members, during such times important legislation would be adopted and the disenfranchisement of a substantial portion of the nation would represent a loss. *Id.* at 2–3. And, as the committee noted, there might be a quorum problem if the number of incapacitated yet living members made it difficult to convene even a truncated quorum. *Id.* at 3. While this would "not necessarily mean chaos in this country, for the Chief Executive would undoubtedly step into the breach and act without legislative sanction in the national interest," the committee urged that "there need be no departure from constitutional, representative govern-

ment if precautionary steps are taken in advance of atomic catastrophe." *Id.; see also id.* at 4.

At the hearing and in a written submission in the record, the subcommittee heard suggestions from three constitutional scholars recommending consideration of simply making applicable to House vacancies the temporary appointment mechanism of the Seventeenth Amendment. *Id.* at 20–21 (statement of C. Herman Pritchett, Chairman, Department of Political Science, University of Chicago); id. at 30–31 (statement of C.D. Robson, Chairman, Department of Political Science, University of North Carolina); id. at 35–35 (letter from William W. Crosskey, University of Chicago Law School). That, of course, was, the suggestion that had been offered by Senator Case the preceding year.

Professor Pritchett offered the practical point that Governors "wouldn't have to wait until there had been a counting of noses to know that you had actually lost more than half" of the membership. *Id.* at 21. In response to Senator Kefauver's observation that the Constitution's different methods for the House and Senate of filling vacancies may have originated "from the concept that the Senate represented the States and the House Members represented the people," Pritchett noted that the difference originated when "there was no direct election of Senators." *Id.*

Professor Crosskey wrote "I do not perceive very well just why the governors should not be required to make temporary appointments as a matter of course in the case of every vacancy." *Id.* at 35. But if ordinary vacancies were not of enough importance, "the tolerated percentage of vacancies . . . ought to be determined by a practical judgment as to how large a percentage of vacancies can be sustained without a serious loss of efficiency by the House." He thought that 50 percent was high, and that 25 percent would also be high: "[t]en percent would seem about right to my uninformed judgment." *Id.*

The Senate passed S.J. Res. 8 by a vote of 76 to 3. 101 Cong. Rec. 6625–29 (1955).

d. 1960—S.J. Res. 39, 86th Congress

In the 86th Congress, the report of the Committee on the Judiciary again stated the case for a temporary appointment amendment. After some background material, the committee told the Senate that circumstances had changed since the founding: "When the Constitution was drafted, the ability to destroy people on a mass basis by use of weapons of war had not been developed. It was, therefore, highly unlikely that the membership of the House of Representatives could be so decimated as to render that body incapable of exercising its constitutional functions. Indeed, the Founding Fathers had no basis on which to predicate any such assumption." S. Rep. No. 561, 86th Cong., 1st Sess. 1 (1959). Now, however, "advance in the technique of destruction has necessitated a reexamination of the ability of our representative Government to function in time of national disaster." *Id.* at 2.

Senator Kefauver's remarks to the Senate at the outset of the floor debate addressed, among other things, the idea that the House could function with a loss of members because a quorum would be based on living members. "[I]f a truncated House could operate under its rules," he responded, "some States—in fact, many States—might be wholly unrepresented. Such disenfranchisement would be most undemocratic. In times of emergency, as in other times, or possibly more so than in other times, our Government should remain a government of the people. Membership should be brought back as closely to the authorized number as quickly as possible." 106 Cong. Rec. 1382 (1960). Under the Constitution as it now stands, that would require special elections, which would take time. Because attacks on other major centers of population could be expected, "it might not be possible to hold elections in many States for many months. If we are to have representative government during this period, Governors must have the power of appointment." *Id.*

On February 2, 1960, the Senate passed, for the third time, a proposed constitutional amendment on temporary House appointments. The relevant portion of S.J. Res. 39 (which also contained proposed poll tax and District of Columbia voting rights amendments) provided:

> On any date that the total number of vacancies in the House of Representatives exceeds half of the authorized membership thereof, and for a period of sixty days thereafter, the executive authority of each State shall have power to make temporary appointments to fill any vacancies, including those happening during such period, in the representation from his State in the House of Representatives. Any person temporarily appointed to fill any such vacancy shall serve until the people fill the vacancy by election as provided for by article I, section 2, of the Constitution.

Journal of the Senate, 86th Cong., 2d Sess. 82–83 (1960); *see* 106 Cong. Rec. 1764–65 (1960). The House that year acted only on a District of Columbia presi-

dential election amendment, which became the 23rd Amendment. The following Congress sent a poll tax amendment to the states.

e. 1961—H.R.J. Res. 29, et al., 87th Congress

In 1961, initiative for a temporary appointments amendment shifted back to the House. Judiciary Committee Chairman Celler, who introduced one of four proposed amendments (H.R.J. Res. 91), led off the testimony. *Constitutional Amendments for Continuity of Representative Government During Emergency: Hearing on H.R.J. Res. 29, et al., Before Subcommittee No. 2 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961). His amendment would have authorized the filling of vacancies by gubernatorial appointment if the total number of House vacancies exceeded House the authorized House membership. *Id.* at 3. The other three would have been triggered when vacancies exceeded 145 members, a third of the House's membership. *Id.* at 2–3. On that difference, Celler assured the committee that "I am not going to quarrel with the number." *Id.* at 5.

Celler told the committee that the amendment's purpose was to enable Congress "to function effectively in time of emergency or disaster." *Id.* at 4. It was "not born of hysteria, but represents a readiness to continue the orderly processes of government in any and all events. Adoption of this resolution would be a demonstration particularly to the enemies of freedom, that we mean to carry on our democratic form of government come what may." He advised the committee that the Department of Justice (of the new Kennedy Administration) "has indicated it is in support of this proposal because it becomes clearer and clearer as tension piles upon tension that to ignore this proposal is to tempt the fates." *Id.* at 5. On the question whether the House could function in the absence of a majority, Celler said he thought the House could not function, id., but even if it was assumed that three Members were sufficient for operational purposes "that would not constitute representative government." *Id.* at 6.

Nicholas Katzenbach, then an Assistant Attorney General, presented the views of the Department of Justice, telling the committee "we do believe that this is an extremely important matter and that it should be provided for by constitutional amendment." *Id.* at 25. If there were a disaster, while "the executive would be forced, under these circumstances, to carry on, it would be extremely difficult to carry on in a way provided by the Constitution" *Id.* But he also told the committee that there practical questions to consider, including "a difficulty in knowing whether or not the number of vacancies occurred, and indeed what constituted a vacancy." *Id.* at 26. He suggested the benefit of a "briefer form" of resolution such as the Chairman's, id. at 29, and for providing detail by legislation.

The committee did not report a temporary appointments amendment to the House. Later in the Congress it reported a poll tax amendment to the House, which passed it.

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Continuity of Government: Current Federal Arrangements and the Future

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Summary

Continuity of government refers to the continued functioning of constitutional government under all circumstances. Arrangements for the continued operation of the federal government in the event of a national emergency or catastrophe are specified in law, policy, and plans, some of which are not public information, given their sensitive, contingent status. This report reviews the public record concerning federal continuity of government arrangements. It will be updated to reflect significant developments.

As a condition of office, the President swears or affirms a pledge to preserve, protect, and defend the Constitution of the United States, which also requires members of the Senate, the House of Representatives, and the individual state legislatures, as well as all executive and judicial officers of the United States and the several states, "to support this Constitution".[1] Arguably, such provisions constitute a basis for these principal government officials, in their separate capacities, to contribute to policy and planning for the continued functioning of constitutional government under all circumstances. During the latter half of the 20th century, such preparations were conducted earnestly and elaboratively, particularly with the onset of the Cold War and the increasing prospect of nuclear attack upon the nation. Arrangements for the continued operation of the federal government in the event of a national emergency are specified in law, policy, and plans, some of which are not public information, given their sensitive, contingent status.

Background

While the Constitution prescribed some arrangements concerning succession to the presidency and the replacement of elected and appointed officials, widespread concern about the continued functioning of constitutional government under all circumstances probably did not arise prior to the assassination of President Abraham Lincoln on April 14, 1865. The assassination of the President was not totally unthinkable—an attempt to murder President Andrew Jackson in the Capitol rotunda on January 30, 1835, ended

[1] See Article 2, section 1, and Article 6.

when both pistols of the would-be assassin misfired—but was generally regarded as highly unlikely. However, in the aftermath of Lincoln's demise came the assassination of President James A. Garfield in 1881, the murder of President William McKinley in 1901, and the wounding of President Theodore Roosevelt in 1912. Presidential protection by the U.S. Secret Service began informally and without statutory sanction in 1894.

In 1792, Congress had provided, in accordance with constitutional prescription, for succession to the presidency, when both the office of the President and the Vice President were vacant, by, first, the President pro tempore of the Senate or, next, the Speaker of the House of Representatives. In this constitutionally suspect arrangement, these legislative branch officials were to serve in an acting capacity, holding office only until a new President could be chosen.[2] Congress returned to the matter in 1886, establishing a line of succession relying upon the Cabinet, following the order of the establishment of the departments. Any Cabinet official coming to the presidency via this arrangement would have to possess the constitutional qualifications to hold the office, and would temporarily act as President by virtue of his Cabinet position, which he would retain, thus becoming a member of his own presidential Cabinet.[3]

During the Civil War, Secretary of State William Seward and Secretary of War Edwin Stanton created counterespionage organizations, but these were directed against spies and saboteurs rather than potential assassins of public officials. Similarly, during World War I, the Departments of Justice, the Navy, the Post Office, and War, among other entities, conducted intelligence operations and investigations to ferret out spies, saboteurs, and the disloyal, but life-threatening attacks upon government leaders by such enemies does not appear to have been a major concern. Submarine warfare and aerial bombardment, while effective new techniques in warfare, utilized limited technologies posing no major threat to the defense of the domestic territory of the United States or constitutional government. Perhaps more disturbing in this regard was the March 1917 revelation of a communique from German foreign minister Arthur Zimmermann to his diplomatic agent in Mexico telling him that, in the event of war between the United States and Germany, he was to propose an alliance between Germany and Mexico, with the understanding "that Mexico is to reconquer the lost territory in New Mexico, Texas, and Arizona."

The December 7, 1941, attack on Pearl Harbor by Japanese naval aircraft (and the American April 18, 1942, retaliatory bombing of Tokyo by aircraft under the command of Colonel James H. Doolittle) demonstrated that at least carrier-assisted bombers could reach the continental United States. Enemy long-range aircraft capabilities were indeterminate during the early months of the war.

> The week after Pearl Harbor, the Secret Service presented the president with a long report of recommended changes to improve White House security. It proposed covering the skylights with sand and tin, camouflaging the house, painting the colonnade windows black, setting up machine-gun emplacements on the roof, and building an air raid shelter in a subbasement area of the new East Wing. The president rejected most of the suggestions, "with not a little annoyance," though he finally agreed to the construction of a temporary shelter in the Treasury Department, which would be

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[2] 1 Stat. 239.

[3] 24 Stat. 1.

accessed by a tunnel that would run under the street from the White House to the Treasury.[4]

Shortly after the conclusion of World War II, the United States found itself drifting into increasingly hostile relations with its former ally, the Soviet Union. As early as November 3, 1946, Soviet Foreign Minister V. M. Molotov attacked U.S. foreign policy in a United Nations General Assembly address. The American response included the 1947 inauguration of the Truman Doctrine for the containment of Soviet expansion and the Marshall Plan for European economic recovery, the 1948 launching of the Berlin airlift, and the 1949 creation of the North Atlantic Treaty Organization. The so-called Cold War took a dramatic turn in September 1949 when it was disclosed that an atomic explosion had occurred in the Soviet Union. Recognizing that the Soviets had the capability of producing atomic bombs, American military planners began to assess delivery capabilities. The development of jet-propelled bombers of increasingly longer range and their mid-air refueling, as well as intercontinental and submarine-based missiles carrying nuclear warheads, confirmed the reality of a possible nuclear attack upon the United States.

Response to the possibility of nuclear attack took various forms. For the armed services, increasingly sophisticated detection and interception capability, and guaranteed counter-force response, were developed. Civil defense planning, preparations, and training for public officials, community leaders, and the American people were undertaken.[5] New policies established, or actions taken, in support of the continuity of government at the federal level are less well known.

Two months after succeeding to the presidency upon the death of President Roosevelt, President Harry S. Truman sent a June 19, 1945, special message to Congress asking for a revision of the succession law. He noted that, in naming his Cabinet members, a President chose his successor, and concluded that, "I do not believe that in a democracy this power should rest with the Chief Executive."[6] In the face of congressional failure to complete legislative action, he renewed his request in his January 14, 1946, State of the Union message[7] and, again, in a February 5, 1947, letter to Senate and House leaders.[8] Five months later, congressionally approved legislation came to the President's desk and was signed into law on July 18. It placed the President pro tempore of the Senate and the Speaker of the House in the line of succession after the Vice President and ahead of the Cabinet secretaries. To become acting President, the President pro tempore or the Speaker would be required to resign his congressional position and otherwise meet the

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[4] Doris Kearns Goodwin, *No Ordinary Time, Franklin and Eleanor Roosevelt: The Home Front in World War II* (New York: Simon and Schuster, 1994), p. 298.

[5] See Harry B. Yoshpe, *Our Missing Shield: The U.S. Civil Defense Program in Historical Perspective* (Washington: Federal Emergency Management Agency, 1981).

[6] U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1945* (Washington: GPO, 1961), pp. 128-131.

[7] U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1946* (Washington: GPO, 1962), p. 52.

[8] U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1947* (Washington: GPO, 1963), pp. 122-123.

constitutional qualifications to hold the presidential office. The statute became effective on January 20, 1949.[9]

Continuity of government planning conducted in the context of civil defense preparations came under direct presidential purview in 1962 when President John F. Kennedy signed a series of executive orders assigning emergency preparedness functions to the Cabinet departments and selected agencies.[10] These and subsequent related orders were consolidated and upgraded in E.O. 11490, issued in 1969,[11] which was upgraded by E.O. 12656 in 1988.[12] The details of the continuity of government plans and preparations produced pursuant to these directives are not public information, due to their sensitive, contingent status. It has been reported, however, that such arrangements do include the protection of the leaders of Congress and the justices of the Supreme Court.[13] There were, as well, plans for relocating the President and Congress in operational facilities outside the District of Columbia in the event of imminent nuclear attack.[14]

A series of presidential national security directives have also fostered continuity of government planning and preparations. The current authority in this series, Presidential Decision Directive 67 (PDD 67), was signed by President William Clinton on October 21, 1998, and relates to ensuring constitutional government, continuity of operations planning, and continuity of government operations. Federal agencies are required to develop Continuity of Operations Plans for Essential Operations that identify those requirements necessary to support the primary functions of the agencies, such as emergency communications, a chain of command, and delegation of authority. PDD 67 replaced a similar instrument, National Security Directive 69, signed by President George H. W. Bush on June 2, 1992. This latter authority had succeeded National Security Directive 37 of April 18, 1990, and National Security Decision Directive 55 of September 14, 1982. The full text of these directives remains security classified.

Current Arrangements

The Legislative Branch. The Constitution provides that in the event of vacancies in the representation from any state, the governor of the affected state shall issue writs of election to fill such vacancies or, in the case of a Senate vacancy, may, if so empowered by state law, make a temporary appointment until an election may be held, in accordance with state law. Plans exist for the protection of the leadership of Congress, evacuation from the seat of government being a primary action. Additional details of these plans and comparable plans of legislative branch agencies, such as the Congressional Budget Office, the General Accounting Office, and the Library of Congress, are not public information.

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[9] 61 Stat. 380; 3 U.S.C. 19.

[10] See E.O. 10997-11005, E.O. 11051, and E.O. 11087-11095, 3 C.F.R., 1959-1963 Comp., pp. 540-572, 635-644, 722-749.

[11] 3 C.F.R., 1966-1970 Comp., pp. 820-861.

[12] 3 C.F.R., 1988 Comp., pp. 585-610.

[13] See Edward Zuckerman, *The Day After World War III* (New York: Viking, 1984).

[14] Ted Gup, "The Last Resort," *Washington Post Magazine*, May 31, 1992, pp. 11, 13-15, 24-27; Kenneth J. Cooper, "Hill Leaders 'Regret' Reports on Bomb Shelter Site," *Washington Post*, May 30, 1992, pp. A1, A9; Ted Gup, "The Doomsday Plan," *Time*, vol. 140, Aug. 10, 1992, pp. 32-39.

The Executive Branch. The Constitution provides that, in the event of the death of the President, the Vice President shall become President. In the event of vacancies in the offices of both the President and the Vice President, statutory law prescribes the line of succession, beginning with the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, and the members of the traditional Cabinet, beginning with the Secretary of State and extending to the other comparable positions in the order of their statutory creation. On December 18, 2001, President Bush signed seven executive orders prescribing the line of succession within certain key departments in the event a Cabinet secretary is killed or incapacitated.[15] Federal departments and agencies have been assigned emergency preparedness responsibilities, including planning for the continuity of government. Aspects of these plans include evacuation of the President and other principal executive officials to locales outside the seat of government and, in some cases, their relocation at secondary or satellite management centers where they shall continue to perform their administrative responsibilities. Various aspects of emergency or crisis coordination may be conducted by the National Security Council, the Federal Emergency Management Agency, the Department of Defense, the recently established Office of Homeland Security, and federal financial management entities.

The Judicial Branch. The Constitution establishes the Supreme Court of the United States and prescribes the statutory creation of inferior federal courts, but it is silent regarding the continued functioning of the federal judiciary during or after an incapacitating catastrophe. Plans exist for the protection of the justices of the Supreme Court, but the details of these plans are not public information. In locales of the United States where federal courts could not function due to an emergency, the President might temporarily declare martial law and vest trial court authority in military tribunals convened by commanding officers in the field dispatched to enforce federal law.[16]

The Future

Shortly after the September 11 terrorist attacks on the World Trade Center in New York City and the Pentagon in suburban Washington, DC, political scientist Norman Ornstein critically questioned the adequacy of constitutional arrangements concerning the continuity of Congress in the event many or most of its members were obliterated as a result of similar such terrorist action.

> A literal reading of the Constitution would cast doubt on whether Congress could even convene under those circumstances; Article I states that a majority is required in both chambers to pass laws or conduct other vital business. Basically, since the Civil War, however, the House and Senate have defined the quorum not as a majority of the overall membership of the House and the Senate but as a majority of those duly chosen, sworn and living. So if the House, for example, lost 300 of its Members to a natural disaster or terrorist attack, only 68, half of those remaining, would be needed to allow the chamber to do business.
>
> However, if there were a substantial number of Members alive but incapacitated, the smaller quorum requirement might still be impossible to achieve, leaving Congress unable to do any significant business. Even if it could convene, for Congress to operate under those circumstances for long—passing sweeping anti-terrorist laws, emergency

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[15] E.O. 13241-E.O. 13247, *Federal Register*, vol. 66, Dec. 21, 2001, pp. 66258-66272.

[16] See 10 U.S.C. 332.

> appropriations and economic recovery measures—would tax its legitimacy, particularly if there were much greater partisan and regional differences among the surviving (and ambulatory) lawmakers than existed in the full House.[17]

Ornstein also took issue with current constitutional arrangements for filling vacant House seats—special elections governed by widely differing state laws with significant waiting periods before their occurrence. "Some don't allow special elections at all within 180 days of the end of a Congressional term," he noted. "The past six special elections to fill House vacancies have taken three to six months."

His solution to these inadequacies was "to create a small, short-term task force of constitutional scholars and former lawmakers to report to the top four Congressional leaders with suggestions for reform" and legislation "that would expedite special elections under emergency circumstances." He also proffered the possibility of a constitutional amendment, "crafted narrowly and carefully, to lay out ways to fill Congress temporarily if disaster or an act of war reduced its ranks below the regular quorum."

Shortly thereafter, Representative Brian Baird introduced a proposed amendment to the Constitution (H.J.Res. 67) that would authorize state governors, within seven days whenever one-fourth of the 435 members of the House were incapacitated, to appoint replacement House members to 90-day terms. Special elections would be held within the 90-day period.[18] Offered on October 10, 2001, the measure was referred to the Committee on the Judiciary. A companion measure (S.J.Res. 30), setting a 50% loss of House membership as a threshold for the appointment of temporary Representatives, was introduced by Senator Arlen Specter on December 20. If enacted into federal law, either proposal would have to be ratified by the legislatures of three-fourths of the states within seven years after the date of its submission for ratification before it would amend the Constitution. Since 1789, the Constitution has been amended 27 times, including the 10 articles of the Bill of Rights.

Other proposals have been aired recently in the press. Objecting to a constitutional amendment that would authorize governors to name temporary members of the House, Representative Victor F. Snyder wants to encourage the states to revise their special election laws to allow more expeditious elections to replace House members who die. Representative James R. Langevin proposes an "e-Congress" system, a secure telecommunications arrangement for voting and communicating among Members of Congress in the event they could not meet in a single place due to an emergency. Representative Brad Sherman would change the presidential succession line so that, in the event both the presidential and vice presidential offices were vacant, a previously designated congressional leader from the President's political party would assume the presidency. No legislation has been introduced concerning these proposals.[19]

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[17] Norman Ornstein, "What If Congress Were Obliterated? Good Question," *Roll Call*, vol. 47, Oct. 4, 2001, p. 10.

[18] Associated Press, "Disaster Plan Would Refill House Seats," *Washington Times*, Oct. 11, 2001, p. A16; Ben Pershing, "Rep. Baird: Fix Constitutional 'Weakness'," *Roll Call*, vol. 47, Oct. 11, 2001, p. 3.

[19] Dana Milbank, "Worst-Case Scenario: The U.S. Has None," *Washington Post*, Dec. 10, 2001, pp. A1, A14.

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Martial Law and National Emergency

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Summary

Crises in public order, both real and potential, often evoke comments concerning a resort to martial law. While some ambiguity exists regarding the conditions of a martial law setting, such a prospect, nonetheless, is disturbing to many Americans who cherish their liberties, expect civilian law enforcement to prevail, and support civilian control of military authority. An overview of the concept of, exercise of, and authority underlying martial law is provided in this report, which will be updated as events warrant.

Occasionally, when some national emergency or crisis threatens public order in the United States, the comment is made that the President may ultimately resort to imposing martial law in order to preserve discipline and good behavior. Such was the case when it was thought that year 2000 (Y2K) technology problems might result in situations threatening life, property, or the general welfare in American society. The almost flawless transition to the year 2000, of course, rendered such an action unnecessary. More recently, at least one newspaper erroneously reported that the September 14, 2001, declaration of a national emergency by President George W. Bush in response to terrorist attacks in New York City and Washington, DC, "activated some 500 dormant legal provisions, including those allowing him to impose censorship and martial law."[1] In accordance with the requirements of the National Emergencies Act, the President's declaration actually activated nine selective provisions of statutory law, identified in his proclamation, pertaining to military and Coast Guard personnel.[2]

Such comments, nonetheless, suggest a consideration of what martial law constitutes, as well as when and how it might be invoked. According to one definition, martial law "exists when military authorities carry on government or exercise various degrees of control over civilians or civilian authorities in domestic territory." More significantly, it "may exist either in time of war or when civil authority has ceased to function or has

[1] See Frank J. Murray, "Wartime Presidential Powers Supersede Liberties," *Washington Times*, Sept. 18, 2001, pp. A1, A12.

[2] See Proclamation 7463, *Federal Register*, vol. 66, Sept. 18, 2001, pp. 48197-48199; the provisions of the National Emergencies Act may be found at 50 U.S.C. 1601-1651.

become ineffective."[3] Constitutional scholar Edward S. Corwin agrees with this understanding, but also offers important qualifications.

> A regime of martial law may be compendiously, if not altogether accurately, defined as one in which the ordinary law, as administered by the ordinary courts, is superseded for the time being by the will of a military commander. It follows that, when martial law is instituted under national authority, it rests ultimately on the will of the President of the United States in his capacity as Commander-in-Chief. It should be added at once, nevertheless, that the subject is one in which the record of actual practice fails often to support the niceties of theory. Thus, the employment of the military arm in the enforcement of the civil law does not invariably, or even usually, involve martial law in the strict sense, for ... soldiers are often placed simply at the disposal and direction of the civil authorities as a kind of supplementary police, or *posse comitatus*; on the other hand, by reason of the discretion that the civil authorities themselves are apt to vest in the military in any emergency requiring its assistance, the line between such an employment of the military and a regime of martial law is frequently any but a hard and fast one.[4]

The Record of Practice

Probably utilized by the federal government for the first time in 1814 when proclaimed by the victorious General Andrew Jackson, martial law was not part of the experience of a great many Americans in the period prior to the Civil War, and, therefore, its potentially arbitrary and authoritarian nature was not especially fearsome to the populace. In this regard, an observation by historian James G. Randall might be recalled.

> That martial law was not always considered oppressive is shown by the fact that citizens sometimes petitioned for it. Some Philadelphians, for instance, requested the President to declare martial law in their city at the time of [Confederate General Robert E.] Lee's invasion to enable them to put the city in a proper state of defense. Nor should we suppose that the existence of martial law necessarily involved a condition of extensive or continuous military restraint. Beginning with September, 1863, the District of Columbia was subjected to martial law, and this state of affairs continued throughout the war, but it should not be supposed that residents of the capital city were usually conscious of serious curtailment of their liberties. The condition of martial law was here used as a means of military security. That martial law should be declared in areas of actual military operations was, of course, not remarkable.[5]

As territory of the Confederacy was overtaken by Union forces, it was governed under military authority and martial law. This state of affairs in the South, with regard to martial law, continued into the Reconstruction period. "Since the Civil War era," notes Joseph E. Kallenbach, "there have been no proclamations of martial law by Presidents directly on behalf of the national government, although President Hayes very seriously

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[3] Henry Campbell Black, *Black's Law Dictionary*, 6th edition (Saint Paul, MN: West Publishing, 1990), p. 974.

[4] Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th revised edition (New York: New York University Press, 1957), p. 139.

[5] James G. Randall, *Constitutional Problems Under Lincoln*, revised edition (Urbana, IL: University of Illinois Press, 1964), p. 170.

considered issuing such a proclamation during the railroad strike crisis of 1887. There have been conditions of limited martial law established with the explicit or implicit approval of the President by officers in the field, however," he adds.[6]

These occasional invocations of martial law during the post-Civil War period occurred most often in labor disputes, but, as one chronicler recounts, other disturbances of the public order were involved as well.

> Qualified martial law was twice declared ... by federal military officers in the period after the [first] World War when presidential control of troop activities was so greatly relaxed. According to the report of the Secretary of War, as a result of the race riot in Omaha, Nebraska, General Leonard Wood "took personal charge of the situation, and on October 1, 1919, proclaimed the city under qualified martial law." Five days later, because of the danger of violence in Gary, Indiana, during the steel strike, General Wood, after conferring with the municipal authorities, placed that city also under qualified martial law.
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> There have been other instances where the modified form of martial law existed in fact, though undeclared. General Merriam placed restrictions on travel into and out of the mining camps of Idaho's Coeur d'Alene in 1899. In the Colorado disturbance of 1914, saloons were closed (a common practice), the sale of arms was forbidden, arms and ammunition were seized, and the opening of mines was forbidden as was also the importation of strike-breakers. Public assemblies were forbidden and arms were taken in the West Virginia strike zone in 1921.[7]

The military has been utilized on a number of occasions since World War Iw hen Presidents have sought to maintain public order, but have not invoked martial law. Such examples include the routing of the Bonus Army in 1932 in the District of Columbia; maintaining public order during desegregation efforts at Little Rock, AR, in 1957, the University of Mississippi in 1962, and the University of Alabama the following year; and quelling civil disturbances within Washington, Detroit, Chicago, and Baltimore during 1967 and 1968.

With the bombing of Pearl Harbor on December 7, 1941, the territorial governor declared a condition of martial law, which "was approved by the President."[8] The action was authorized by the Organic Act of the Territory of Hawaii, which provided for a declaration of martial law by the governor, with the President being informed of such action.[9] The military remained in control of the islands until October 24, 1944.

On February 19, 1942, President Franklin D. Roosevelt issued E.O. 9066, which authorized the Secretary of War "and the Military Commanders whom he may from time

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[6] Joseph E. Kallenbach, *The American Chief Executive: The Presidency and the Governorship* (New York: Harper and Row, 1966), p. 553.

[7] Bennett M. Rich, *The Presidents and Civil Disorder* (Washington: Brookings Institution, 1941), p. 210 (footnotes omitted).

[8] Robert S. Rankin and Winfried R. Dallmayr, *Freedom and Emergency Powers in the Cold War* (New York: Appleton-Century-Crofts, 1964), p. 47.

[9] 31 Stat. 141 at 153.

to time designate" to establish "military areas" from which "any or all persons" might be excluded in order to prevent espionage and sabotage.[10]

> The following day secretary of War Henry L. Stimson delegated this authority to Lieutenant General J. L. DeWitt, commanding the so-called Western Defense Command. General DeWitt in his turn established by proclamation "Military Areas Nos. 1 and 2," consisting of three westernmost states and part of Arizona. By a series of 108 separate orders he then, with the aid of the troops under his command and the War Relocation Authority (established by another executive order on March 18, 1942), proceeded to remove all persons of Japanese ancestry from these two areas.[11]

This action did not involve martial law, although martial law was established within at least one of the internment camps.[12] Roosevelt issued the order as President and Commander in Chief in fulfillment of his statutory responsibilities to protect national defense material, premises, and utilities from espionage and sabotage.[13]

Since the conclusion of World War II, martial law has not been presidentially directed or approved for any area of the United States. Federal troops have been dispatched to domestic locales experiencing unrest or riot, but in these situations the military has remained subordinate to federal civilian management. Technological corrections and adjustments averted the need to invoke martial law due to Y2K failures and resulting public disorder. The September 11 terrorist attacks on the World Trade Center in New York City clearly demonstrated that civilian law enforcement authorities were adequate to managing the situation without resort to martial law or even the introduction of federal troops.

Relevant Authority

In fulfilling constitutional responsibilities to put down insurrection, rebellion, or invasion, the President may resort to invoking martial law. His action, in this regard, is subject to judicial review.[14]

The President may also exercise certain authority to create a condition similar to, but not actually one of, martial law. In the event "the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any State or

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[10] 3 C.F.R., 1938-1943 Comp., pp. 1092-1093.

[11] Clinton L. Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, NY: Cornell University Press, 1951), pp. 42-43 (footnotes omitted).

[12] Robert S. Rankin and Winfried R. Dallmayr, *Freedom and Emergency Powers in the Cold War*, p. 46n.

[13] Prior to full-scale implementation of the President's order, congressional approval of its intent was sought and obtained with the legislating of supporting criminal penalties; see 56 Stat. 173; these penalties, codified at 18 U.S.C. 1383, were repealed by the National Emergencies Act in 1976, 9 Stat. 1255 at 1258.

[14] See, for example, *Ex parte Milligan*, 31 U.S. 2 (1866); *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."[15] Such use of troops may be under the management of federal civilian authorities, such officials of the Department of Justice, or, in the event circumstances so merit, under armed forces command, in which case the commanding officer in the field may be ordered, at least temporarily, to invoke martial law. The President may order units of the Ready Reserve to active duty status[16] or call units of the National Guard into federal service.[17] As active duty military, these forces could also be deployed to enforce federal law.

While some ambiguity exists regarding the conditions of a martial law setting, such a prospect, nonetheless, is disturbing to many Americans who cherish their liberties, expect civilian law enforcement to prevail, and support civilian control of military authority. As long ago as 1962, sensitivity to these values was apparent when the Kennedy Administration reportedly instructed a high-level emergency planning committee that "nationwide martial law is not an acceptable planning assumption" in preparing for the survival of the nation following a nuclear attack.[18] Veteran news correspondent Walter Cronkite stated the case a few years later when he wrote that "we must not merely prepare for the survival of individuals but also for the survival of our democratic system," and, indeed, "to be certain that everything is done to preserve the post-war population's confidence in government."[19]

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[15] 10 U.S.C. 332.

[16] 10 U.S.C. 12302.

[17] 10 U.S.C. 12405-12406.

[18] Edward Zuckerman, *The Day After World War III* (New York: Viking, 1984), p. 216.

[19] Walter Cronkite, "Introduction," in Eugene P. Wigner, ed., *Who Speaks for Civil Defense?* (New York: Charles Scribner's Sons, 1968), p. 11.

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